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THE C.A.U.T. AND TENURE

Two Editorials

The C.A.U.T. cannot be accused of having moved in ill-considered haste to enunciate a policy on tenure. More than ten years after its establishment as a national organization, it is still without a statement of principles that would explain the relevance of tenure to the function of the university teacher and set out the operative rules governing its acquisition, protcetion and loss. Fragmentary declarations of policy there have been; and procedural devices to ensure a threatened professor of notice and a fair hearing were adopted quite early, but in somewhat exigent circumstances. The reasons for the deliberation with which the C.A.U.T. has been moving to a firm policy are evident from the admirable study made by Professor Soberman and from the illuminating comments that have been contributed by colleagues across Canada. At bottom, tenure is bound up with the function and direction of a University or College, and the University or College professor in Canada has been over-zealous in his selfless appreciation of that function and direction to the point, at times, of viewing it as if it could operate without him. The time for such depreciatory detachment —which was never realistic—has long ago passed. Because the professor *is* the University or College, he must meet head on the need to formulate rules for the most effective deployment of the human resources which give a University or College its on-going life. He must ask, among other things, what are the reasonable supporting requirements for his engagement to participate in the operation of the University or College as an academic institution; how will such requirements affect the standards of competence which his profession endorses; and how can he best insure that personal and institutional integrity will mesh in the day to day discharge of the function of a University or College?

The answers to these questions are the stuff of a sensible policy on tenure. Security of employment, as such and for its own sake, has never been the dominating consideration for the C.A.U.T. nor is there any reflection of this kind to be found either in Professor Soberman's study or in the comments appended to it. The C.A.U.T. can now move more confidently to the enunciation of policy, knowing that it may be subject to change in the fullness of experience but equally conscious that the time is propitious for coming to conclusions on what tenure is and what it entails.

So far as Professor Soberman's study reflects merely the common law, the C.A.U.T. has recognized the need to have a companion study

that will examine the issues in tenure in terms of the civil law and the University tradition of our French-speaking colleagues in the Province of Quebec.

Bora Laskin,
President, C.A.U.T.

This is a period in which the university teacher finds himself in a position to bargain effectively for better salaries, pensions, insurance plans, and so on. It is essential that academic freedom should not come to be thought of as one of the "fringe benefits" that he enjoys. Both he and the public need to be continually aware that it is, on the contrary, an essential condition of his work; without it his usefulness to society is bound to be impaired. if not altogether destroyed.

In the same way, it must be recognized that tenure also is not a fringe benefit. It is simply one of the two most important means by which academic freedom can be effectively defended; it is the one way of assuring the individual professor that his work as teacher or researcher may not be interfered with for extraneous reasons of religious belief, political opinion, clashes of personality with administrative officers, or the like. It does not set him free to do as he wants: it does make him free to do his best.

It has never been more important that these principles should be understood and upheld. The bargaining position of the professor arises from the current vast expansion of the program of higher education. That expansion is inevitably necessitating larger and larger governmental subsidies. Where government money goes, politicians' fingers follow. There can be no question that we are approaching a confrontation between universities and government, the consequences of which for our society could be of the most disastrous kind. For if in fact politicians should yield to the growing temptation to intervene in the affairs of universities, the effectiveness for good of higher education in Canada might well be almost nullified: we might go on inventing new gadgets; we should have to give up discussing how or for what end they should be used. To authority, nothing is so dangerous as ideas.

The best preparation for that confrontation may well be a campaign to educate governments themselves as to the functions of universities and the nature of academic freedom. Such a campaign is not likely to be effective, however, unless the members of the universities have themselves understood fully that freedom, and seen to it that it was given every protection that they could provide. The most important means of protecting academic freedom is exercising it, continually and courageously; the second most important is the device of tenure.

J.P.S.

THE J. H. STEWART REID MEMORIAL FELLOWSHIP TRUST

An Editorial

The project to establish a graduate fellowship in honour of Dr. Stewart Reid is well launched and on its way. It is the first project in which C.A.U.T. has launched an appeal for funds from the entire membership. It is a substantial enterprise requiring substantial total contributions. The goal is $50,000 and it is clear that the full amount will be necessary to provide a fellowship of rank and stature. A name scholarship inadequately endowed might better not be endowed at all. The goal must be reached and it undoubtedly will be if each and every Canadian university teacher accepts a share of the responsibility.

Members of the Trust Committee are confident that the request for contributions for this particular enterprise commends itself to C.A.U.T. members without exception. There is clearly a widespread desire to share in a lasting expression of admiration and gratitude for a fellow scholar who gave so selflessly and creatively to the university teaching profession and whose contribution was cut short by untimely death.

Most members of C.A.U.T. at the present time knew Stewart Reid personally. Many worked closely with him. So rapid is the expansion in the ranks of university teachers, however, that already there are some who know of him and his work only by report and reputation. The proportion of these to the total will increase year after year. For these it can only be repeated that Stewart was an outstandingly creative scholar and teacher, that he became Executive Secretary of C.A.U.T. following the courageous and uncompromising defence of a colleague in a matter involving academic freedom, and that in the National Office he combined administrative skill with a fine perception and an understanding of the opportunities of his new career which could derive only from long devotion to the university teaching profession.

The proposed form of the memorial must commend itself especially to university teachers. A perpetual graduate scholarship provides both incentive and instrument for the furtherance of intellectual achievement. University teachers, who naturally and necessarily hold the most diverse views on many matters, are nevertheless in firm agreement that the encouragement of youth of exceptional promise yields the greatest and most lasting rewards attainable in the academic community. The opportunity to assist in the establishment of a worthwhile scholarship named in honour of Dr. Stewart Reid is one that no member of C.A.U.T. will want to miss.

V. C. Fowke

TENURE IN CANADIAN UNIVERSITIES*

A report prepared by Daniel A. Soberman, Faculty of Law, Queen's University.

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*The general part of Professor Soberman's paper is believed to have general application to Universities in Canada, whether English or French speaking, but the legal part is confined solely to the Common Law.

PART I TENURE IN PERSPECTIVE

Significance of Tenure

The word *tenure* conjures up various vague ideas and ideals, both to to members of the academic community and to those outside it. To some it means the necessary security to engage wholeheartedly in their profession without fear of repression through dismissal or loss of salary imposed by authorities who control the purse-strings. Others may think of the acquisition of tenure as an excuse for abdicating responsibility, for retreating behind ivied walls and for eccentric conduct and unreal values. Still others may equate it to a sinecure—the end of hard work, the beginning of a lazy life. In truth it is a Pandora's box, as I discovered in originally preparing this article as a report to the C.A.U.T. Committee on Academic Freedom and Tenure.

The reaction to the report was uniform in one respect only: all agreed that tenure involved far more than I had put down; but to satisfy all opinions proved impossible. After striving—and failing—to arrive at a comprehensive definition and setting for tenure, I have settled for a modest description to put the subject in focus. It is that given by Professors Byse and Joughin in their study *Tenure in American Higher Education.*

> . . . the essential characteristic of tenure . . . is continuity of service, in that the institution in which the teacher serves has in some manner—either as a legal obligation or as a moral commitment—relinquished the freedom or power it otherwise would possess to terminate the teacher's service.[1]

The views and criticisms of others concerning the content of tenure as a concept are ably stated elsewhere in this issue of the *Bulletin.*

Why is security of tenure important? It does not rest merely on self-interest by university teachers nor does it rely on solicitude and charity toward them by the general community. Unfortunately, some judges have reflected a patronizing attitude toward university teachers —poor unfortunates—who must be handled gently and patiently. We find an example in a judgement of Mr. Justice Dysart of Manitoba:

> The reason for so qualifying the right to terminate employment is both just and apparent. College professors are men specially trained for their work. Their opportunities for

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[1] Byse and Joughin, *Tenure in American Higher Education,* p. 2. Ithaca, N.Y.: Cornell University Press, 1959.

suitable employment are rare, and if lost are not easily substituted by other congenial employment. Their special training unfits them for general service. In their chosen field, material returns are relatively small. In order, therefore, that this noble profession may still attract recruits, it is wisely acknowledged both in theory and practice that the employment of professors by colleges should be characterized by stability approaching to permanence. This involves fair, considerate and even indulgent treatment in all matters relating to general behaviour . . .[2]

Professors Byse and Joughin give quite different reasons for the importance of tenure:

> . . . Teachers in colleges and universities in our society have the unique responsibility to help students to develop critical capacities. Teachers must also strive to make available the accumulated knowledge of the past, to expand the frontiers of knowledge, to appraise existing institutions, and seek their correction or replacement in the light of reason and experience. If they are to perform these indispensable tasks, there must be free inquiry and discussion . . . [The text then contains the following quotation from Professor F. Machlup.] With regard to some occupations, it is eminently in the interests of society that men concerned speak their minds without fear of retribution . . . The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and he may no longer be able effectively to question and challenge accepted doctrines. And if *some* professors lose their positions for what write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced.
>
> [The text then continues:] The lasting damage brought about by infringements of academic freedom and tenure thus is not only to the very small group of teachers directly affected. It is also to society as a whole, because the ultimate beneficiaries of academic freedom are not those who exercise it but all the people. This deserves emphasis: Academic freedom and tenure do not exist because of a peculiar solicitude for the human beings who staff our academic institutions. They exist, instead, in order that society may have the benefit of honest judgment and independent criticism which otherwise might

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[2] Smith v. Wesley College (1923) 3 W.W.R. 195, at 202.

be withheld because of fear of offending a dominant social group or transient attitude.[3]

Some critics doubt whether tenure is a requisite of academic freedom. In the United States some writers have claimed that tenure perpetuates mediocrity and indifference in those who attain it[4]; but on the whole the weight of opinion is strongly in support of the position quoted above. In Britain there is almost no written discussion of the problem, and in Canada what little published thought we have on the subject has assumed that security of tenure is a good thing.

We cannot, however, ignore the fact that scholars of questionable quality do obtain sinecures in our universities. Such situations do not result primarily from security of tenure but from poor hiring practices, from shortages of qualified teachers and from failure to dismiss second-rate teachers at the end of a probationary period. To minimize the hiring and retaining of incompetent teachers is difficult; it is likely to remain an unsolved problem in universities as it is in government and in other large institutions. It would be unfair to blame university presidents, deans and department heads for being timid in taking action to get rid of intellectual deadwood—indeed we should have good reason to fear if university presidents decided to act as new executive heads of business corporations sometimes do when they take over and revamp their companies. Perhaps society must pay the price for maintaining large collective institutions where seniority and formal processes take precedence over merit and flexibility.

One method suggested for assuring high standards among teachers obtaining tenure is to do away with automatic acquisition of tenure by length of service alone and to require, in addition to a minimum probation period, either that a teacher desiring tenure apply for it or that, when probation is completed, a formal meeting be held by those responsible for granting tenure. The object is to make a re-hiring after such a meeting a deliberate act. For example, a compulsory meeting of a tenure committee consisting of senior members for the teaching staff might be held no later than the first term in the third year of a probationary appointment. The meeting should result in a formal notice given to the probationary appointee: (a) that he has been

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[3] Byse and Joughin, p. 3, containing quotation from Fritz Machlup, "On Misconceptions Concerning Academic Freedom", *AAUP Bulletin* 41: 756 (1955).

[4] See, for example: Edgard F. Borgatta, *The Annals of the American Academy of Political and Social Science,* Vol. 325, p. 142 (1959).

granted tenure, or (b) that his contract will be terminated at the end of the academic year, or (c) that his probationary contract, at his option, will be renewed for a further two years and that before the renewal period ends he will be informed of either (a) or (b). In other words, there should be no further extension of the probationary period. Such a procedure would require a committee to make an active decision rather than merely to acquiesce in a re-appointment; with a little courage it might eliminate many of those who ought not to receive tenure. Assuming that tenure once granted would conform to acceptable standards, it is worthwhile considering the adoption of such a procedure for obtaining tenure in a positive way. It is important that university teachers should want not only to protect themselves from arbitrary dismissal, but also to protect their universities from becoming refuges for mediocrity.

Relation of Tenure to University Government

The relation of tenure to other aspects of academic freedom is perhaps where the greatest divergence of opinion lies. There is general agreement, however, that tenure in the terms of our definition is only one aspect of this larger question. Freedom from dismissal, important though it may be, is a narrow concept of a teacher's relationship with his university. He is equally if not more concerned with his teaching assignments, facilities for research, relationship and proportion of time spent with graduate and undergraduate students, character and ability of his colleagues, plans for expansion in his department, and administrative duties, not to mention salary, prospects of promotion and opportunities for sabbatical leave.

It is evident that that academic freedom can be effectively destroyed in ways other than by dismissing a teacher. A university administration, finding itself unable legally to dismiss a professor with tenure, may choose various methods to make professional life for him humiliating, if not intolerable. For example, it might make it difficult for him to obtain funds for research purposes, for hiring tutors, and marking assistants. It might relieve a teacher of all teaching assignments in his field of special knowledge, and confine him to teaching remedial classes to first year students. Or, he might find other members of his department overtaking him on both salary and rank, despite the acknowledged fact that he is performing his assigned duties very well indeed. It is evident from the animosity found in the few reported legal decisions on tenure in Canada that such tactics are not remote or even highly unlikely.

It is not my purpose however to suggest that university administrations regularly indulge in these abuses, but only to stress that tenure, rather than being an isolated problem, is part of a larger issue of working conditions and university life in general. Inevitably we must conclude that academic freedom and tenure are closely bound to university government, that to create security of tenure in a wider sense academic staff must have an important voice in the government of their institutions at all levels.[5] So long as the university teacher is excluded from university government he will remain at the mercy of university administrators who do not like what he says. There is no practical way of widening the scope of legally protected tenure so as to prevent such abuse. The only way to prevent such tactics from being used is for university teachers to share substantially in university government—to keep a hand on the controls.

This argument, concerned with the academic freedom of the individual teacher, is separate from and in addition to the more general but equally valid contention that a university does not consist of an employer and a number of employees, nor is it simply a body corporate like a business firm. Without relying on historical fact to show that mediaeval institutions were "communities of scholars"—there are grave dangers in seeking support for a contemporary argument in circumstances that existed six hundred or more years ago—important facts exist today to show that universities are much more complex institutions than trading companies. See the excellent discussion by Professor J. L. Montrose of Belfast on this point.[6] For example, in our Canadian universities the board of governors does not function like the board of directors of a company, nor does it have the same powers. First, the governors are in some respects more powerful since they need not refer important decisions to a large body equivalent to shareholders as in a business company. In matters over which they have control their decisions are final. Secondly, governors are less omnipotent than directors for their powers do not cover every facet of university life. Perhaps the most important facet—qualification of students and recommendations for degrees—is almost invariably vested in an academic body. The board of governors cannot award "earned degrees"

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[5] In this respect "A Modest Proposal", by Murray S. Donnelly, deserves study and strong support. See: *A Place of Liberty,* p. 143. Ed. Whalley. Toronto: Clarke, Irwin & Company Limited, 1964.

[6] J. L. Montrose, "The Legal Relation between a University and its Professors", *Universities Review,* Vol. 29, p. 44 (Feb. 1957).

without such recommendation. In addition, control of curricula ordinarily rests not with the board but with the senate or some other academic body. Here we see an important divergence from the employer-employee relationship: It would be strange indeed to find a group of employees in our capitalist system wielding legislative power, as in setting out degree requirements, and administrative and judicial power, as in deciding who passes and who fails.

Furthermore students are not mere customers. They are the end product, the prime purpose of the university; as the beneficiaries of its efforts and the repositories of its future they form the society whom the university serves.

A university then does not consist of an employer and employees. The academic staff are an integral part of the university; they have the first-hand knowledge, the skills and the interest needed to participate fully and effectively in the government of the university. So long as they are denied this right, a grave disservice is done to the university community: effective and informed government is difficult and in some cases impossible; academic freedom, even at institutions where it exists as a legal fact, is highly vulnerable in conditions of crisis; a stake in the university—a sense of participation—especially in younger members of the staff is hardly felt, if at all, and morale and efficiency of the staff suffer generally.

Despite the conclusion that participation in university government is at least as important as security of tenure and that in the long run security of tenure is not very meaninful without a voice in government, we may still find it worthwhile to consider the problems of tenure separately. Tenure would remain important to the freedom of the individual teacher even at institutions where academic staff did participate in university government. And effective tenure regulations form an important part of the whole scheme of academic freedom.

Should Tenure be Legally Protected?

The definition of tenure at the outset of this paper stated that an institution may relinquish its freedom to dismiss, either legally or morally. In tenure as in most other matters the law is merely one of the tools for regulating men's conduct in society; often it is a poor tool, and in almost all circumstances it functions best when legal sanctions are used only as a last resort. Legal remedies are most useful when they remain in the background, when contending parties are each aware

that the other may resort to the courts if one side maintains an unreasonable position without possibility of settlement. These observations apply with more than usual force to problems of academic tenure. Tenure is most effective when university authorities recognize it as a strong moral obligation and respect that obligation.

Indeed it is sometimes contended that legal sanction has no place in the realm of tenure, that university teachers should be satisfied to rely on the goodwill and common sense of the university governing bodies, and that resort to the courts can only lead to unhappy publicity both for the teacher and the institution.[7] Such a position leads to two main difficulties. First, it is precisely in those few cases where goodwill and common sense have been lost and replaced by bitterness and vituperation that the teacher needs protection. Secondly, the teacher becomes servient, one who must rely on the benevolence of his masters and who cannot oppose them. The very presence of legal sanction in the background would permit a teacher to negotiate on fair ground with a hesitant or cantankerous board. Professors Byse and Joughin suggest that when a teacher has legal protection a sympathetic board is better able to oppose the howls for the head of the contentious teacher by a militant group.

Even so, we should observe that most teachers would prefer tenure recognized only as a moral obligation without legal sanction in a university with a long and honourable history of liberal toleration and defence of its more controversial staff members, than tenure legally protected at an institution with a questionable record of academic freedom. The choice is invidious, for the happiest combination is to have legally protected tenure at an institution that strives to live up to its moral obligations.

PART II The LEGAL EFFECT OF TENURE

United States and English Experience

In Canada we have had very few legal decisions on the subject of tenure; by contrast United States decisions on the subject are legion. Unfortunately, American experience is not very useful to us. To delve into the American cases is to find oneself in a morass of technical decisions, depending to a large extent on United States constitutional

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[7] See, for example, the report of a faculty committee of the State University of South Dakota School of Law, 5 *South Dakota Law Review*, pp. 31-35 (1960).

law, both federal and state. Unhappily too, the decisions for the most part are reactionary and would be of little assistance in an argument made in favour of tenure before a Canadian court. Accordingly I shall make only occasional brief references to the United States experience.[8]

There are no reported English decisions on the subject and little editorial comment.[9]

Informal Tenure

Until the last ten years or so, and with one or two exceptions, neither the statutes nor the regulations of Canadian universities recognized tenure expressly as a legal right of the university teacher to remain in service until retirement. In the absence of an express agreement on tenure, what is the legal significance of a contract of employment with a university with respect to tenure? A preliminary question that we may ask is whether the character or statutes of a university permit it to grant tenure to a university teacher. In other words, has it the "power" to bestow tenure, even if it wished to do so expressly? This question arises because many of the charters of institutions in both the United States and Canada contain words to the effect that the governing body may appoint teachers "during pleasure" or that the positions are held "during the pleasure of the Board". It has been contended, sometimes successfully in the United States, that such words *limit* the power of the Board to appoint staff, except during pleasure. That is, at all times the Board retains the arbitrary power to dismiss because the charter does not permit the Board to give up that power. Accordingly, so the argument goes, no customary or implied term in the contract of employment can arise whereby the university authorities surrender the freedom to dismiss at will. Indeed, an express term to that effect would be invalid.

There are only six reported decisions on the subject of tenure in the Canadian courts and on the whole they are not helpful. The over-technical argument made in the above paragraph does not enter directly into any of the Canadian cases and there is no reason to believe that it would have much weight in a Canadian court. In the first place, our courts do not imply restrictions on the contracting powers of corporate

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[8] For the most recent exhaustive discussion of the United States position, see the symposium: "Academic Freedom", *Law and Contemporary Problems,* Vol. 28, No. 3, pp. 429-635 (Summer 1963).

[9] Lord Chorley discusses the present state of academic freedom in the United Kingdom in the issue of Law and Contemporary Problems cited above, page 647.

bodies such as universities unless such restrictions would reasonably follow from the objects of the corporation as stated in its charter or statutes. On the contrary, our courts tend to permit corporations to do anything ancillary or incidental to their main objects. It would be difficult to contend that granting tenure as a condition of employment is not at the very least incidental to the main objects of the university in helping to assure academic freedom; especially is this so in a competitive market where granting tenure might assist in obtaining the best university teachers. It would seem then that most Canadian universities, if they chose to do so, could grant a legal right to tenure as an express term of the contract of employment.

The earliest Canadian case,[10] in New Brunswick in 1861, stated that the professor there dismissed *was* in fact appointed "during pleasure" by Kings College. Its successor, the University of New Brunswick, did not vary the conditions of his employment, and accordingly it had the power to dismiss him at any time. In all the remaining reported cases the governing board was expressly given wide powers to hire at pleasure or upon any other terms, so that the issue did not arise. The report of the New Brunswick case does not set out the circumstances leading to the dismissal or the nature of the dispute between the professor and the university.

Assuming that no absolute bar to the creation of tenure exists in the institution's charter, will tenure be implied as a term of employment by custom and usage? The second case, which arose at Queen's University shortly after the New Brunswick case, seemed to deny that tenure might be so created. At an early hearing of the case Vice-Chancellor Esten considered that the plaintiff's appointment was "during good behaviour, while the duties of his office were performed." In other words he had tenure and could be dismissed only for adequate cause. Since there was no express contract of employment making the appointment "during good behaviour" the Vice-Chancellor must have found it arose by custom. On appeal, however, the court said:

> As to tenure of office the charter gives no express directions on this point . . . we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, . . . determinable as such in the usual manner [by giving reasonable notice].[11]

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[10] Ex parte Jacob (1861) 10 N.B.R. 153.

[11] Weir v. Mathieson (1866) 3 Grant's E.&A. 123, per Hagarty, J. at 151-52.

A similar position was taken by another Ontario court in 1923 on a different problem. The University of Toronto retired a professor at age 68 against his will. He claimed that his appointment was a permanent one, that is without limit of time, "for life, subject only to the appointee's good behaviour and his ability to perform his duties efficiently." In giving judgment Mr. Justice Orde said:

> . . . [plaintiff] endeavoured to adduce evidence of a custom or usage in universities generally and the University of Toronto in particular, that appointments to professorships were appointments for life; . . . I considered any such plea inadmissible and futile in view of the express terms of the University Act that the tenure of office or employment of the Board's appointees should be "during the pleasure of the Board" [unless otherwise provided]. I am unable to see how evidence that the Board had in fact always treated its appointments as life-appointments, or that other universities had done so, could curtail the powers vested in the Board . . .[12]

Although this case was concerned with the power of a board to enforce retirement *at* a specified age, the same argument might be made against implying tenure *until* retirement age. A board could argue that unless tenure were expressly granted it could not become a term of the employment contract.

One possible implied limitation on the power of dismissal was suggested in a Saskatchewan case in 1920. We shall return to this deplorable case later, but for the present we may note that the court said in commenting on the dismissal of three professors:

> The statute and by-laws having, therefore, been complied with, we have, in our opinion, no power to interfere with what has been done, *unless the president or the governors exercised their discretion of removal in an oppressive manner or from corrupt or indirect motive* . . . [italics mine][13]

And in the last reported case in Canada—in Manitoba in 1923—the court held that the contract of hiring with neither "at pleasure" nor was it a "permanent hiring". The court decided that the hiring was from year to year, subject to being determined by a year's notice, but that the board could not terminate the contract unless "in the honest opinion of the board, the best interests of the college so demanded . . ."[14] This limited form of tenure, leaving the board a discretion

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[12] Craig v. Governors of University of Toronto (1923) 53 O.L.R. 312, at 320.

[13] In re The University Act, In re The University of Saskatchewan and MacLaurin et al. (1920) 2 W.W.R. 823, at 824.

[14] Smith v. Wesley College (1923) 3 W.W.R. 195, at 203.

based upon honest belief, turned upon the peculiar facts of the case. There had been a long correspondence between the dismissed professor and the president of the college; the court gleaned the terms of the contract from these letters and not from custom and usage.

Even if all courts agreed that a board could only dismiss a member of the faculty if it honestly believed that the dismissal was in the best interests of the university the effect would be negligible. Dismissal by a board having some corrupt motive or intent to oppress is too remote to be worth considering. A dismissal, no matter how foolish, is likely to be done by a board with righteous indignation and a firm belief in the rectitude of its course of action. It is precisely in these circumstances that a university teacher needs protection and it is here that the courts would refuse to interfere.

It seems, therefore, that there is little hope of establishing legal tenure by custom and usage in Canada. The attempts before the courts have failed. Only in one case in Nova Scotia has a court recognized tenure, and in that case it was expressly granted by the statute which created the college.

Tenure Expressly Created

The Nova Scotia case mentioned above, *Re Wilson*[15] decided in 1885, is interesting in a number of ways. First, it shows clearly that the idea of academic tenure was recognized and legally protected more than one hundred years ago. In the Nova Scotia statute which recognized the college in Windsor in 1853, it is stated:

> . . . The President and Professors shall hold their offices *during good behaviour* [italics mine], but they shall be liable to be removed for neglect of duty, inefficiency, or other just cause, if nine members of the Board vote for such removal.[16]

Admittedly, the words "other just cause" are vague, but it would be difficult to phrase reasons for dismissal without using general words. And some qualification on tenure is essential; even the tenure of judges is subject to limitation—tenure is granted not for all purposes but to ensure that the holder of the office will be able to carry out his duties to the best of his abilities, for the public good. There will always be an area of difficulty where reasonable people will

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[15] Re Wilson (1885) 18 N.S.R. 180.
[16] Ibid. at 196.

disagree on whether a holder of a position with tenure has acted outside the bounds of his protection. The grounds for dismissing a teacher with tenure, even if the same words were used in all institutions, would probably mean different things in different places. A distinction that most readily springs to mind is between sectarian and non-sectarian institutions. It may be quite reasonable to expect a Roman Catholic or a Methodist college to require its teachers not to promote another faith among the students in opposition to the professed objects of the college charter.[17] Yet similar views expressed in a non-sectarian university may be quite acceptable and would not amount to a just cause for dismissal.

Typical grounds for dismissal stated in tenure regulations in American colleges, and copied in Canada recently, are "inefficiency (presumably meaning incompetence), neglect of duty, grave misconduct or moral turpitude and extreme financial exigency of the college." The question of competence or neglect of duty may indeed be difficult: the standard required will vary according to the age, qualifications, experience and rank of the teacher, the obligations he has voluntarily undertaken and the standards of performance within the institution itself. It is difficult to say more about this ground except to point out again that competence should be a matter stressed more at the time of appointment to tenure. No one would doubt that a professor who subsequently becomes indolent and uninterested in his work should be subject to removal. This ground has rarely been raised in dismissal proceedings in the United States and has not entered into any of the Canadian decisions.

The last ground, extreme financial exigency, is of even less importance, and would arise only upon the closure of a department, a faculty or an entire institution. If such a remote possibility occurred in Canada today the most a teacher could hope for would be some financial settlement or adequate notice.

The most common and troublesome cause for dismissal concerns grave misconduct or moral turpitude. These phrases divide into two aspects. The first concerns personal moral wrongdoing, sometimes involving a breach of the criminal law. In the unhappy event that a

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[17] While we may concede that such a requirement is reasonable, nevertheless a sectarian institution should set out limitations expressly; otherwise one is entitled to expect an institution calling itself a university to grant full freedom of expression to its Faculty members.

teacher commits a major crime such as murder, robbery or embezzlement the grounds are clearcut. But more difficult problems may arise: suppose a married teacher is involved in a sexual affair with a student as was alleged in the *Orr* case;[18] or he spends his summers printing fascist leaflets; or he advocates free love or the violent overthrow of the Canadian government in his mathematics lectures? At some institutions the climate of opinion might find all such conduct sufficient cause for dismissal—at others only some of these activities or none at all might be considered sufficient cause. However frequently such activities may come to light the question of consequent dismissal has arisen rarely if at all.

The second aspect of grave misconduct or moral turpitude has only a tenuous connection with the words themselves. This aspect concerns loyalty to the institution, or rather loyalty to the men in authority within the institution, especially the president. Of the six reported decisions in the Canadian courts four centred upon lack of loyalty by the professors in question—their criticisms led to their dismissals. The worst example occurred in the Saskatchewan case mentioned earlier. The three professors who were dismissed showed a "spirit of contumacy to the board and disrespect for its authority" but more important still they lacked a loyalty to the president that the court presumed all faculty members should have:

> It is difficult to understand why a man who is loyal to the president of his own institution should fail him at a time of need, or hesitate to vote loyalty *to his chief* if the loyalty exists. [italics mine][19]

The concept of a university president as a professor's chief is, to say the least, startling. It suggests a hierarchy of authority and command similar to an army rather than to a community of scholars.

The facts of the case were that the university director of extension had accused the president of serious misconduct in the financial affairs of the university. The three professors believed that the allegations might be warranted and wished to have them fully investigated. Referring to their attitude toward the allegations the court said:

> . . . The written reasons signed by the three professors amount to an assertion that the charges of [the director of extension] were such as should be investigated . . . We consider that the

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[18] For discussion of the *Orr Case,* see: C.A.U.T. *BULLETIN,* Vol. II, No. 3, p. 29, Dec. 1962.

[19] In re The University Act [1920] 2 W.W.R. 823, at 829.

> failure to vote confidence in the president's management of the university and loyalty to the president, in the light of the written reasons which were filed, constitute such [an acceptance of the charges made against the president] that it became essential that their services with the university should be dispensed with in case the charges were not substantiated . . .[20]

The court does not say why dismissal should follow; we can conclude only that it was because they were disloyal. The vote referred to presented no alternatives: failure to vote for the president led to dismissal.

This case represents the crux of the problem of tenure in Canada. It is doubtful in our present Canadian political climate that a university teacher would be dismissed for expressing opinions on matters of general politics. Unfortunately, the United States has suffered from such inroads on academic freedom in the recent past and we are not necessarily immune to such attacks. Nevertheless it is university politics rather than general politics that has formed the critical area in the past and is likely to remain so. A teacher who devotes most of his life to teaching at an institution becomes deeply involved in its policies and its future. To criticize either the policies adopted or the persons who make the policies, no matter how bitter and unwarranted the opinions may be, should be the prerogative of one so deeply committed to the institution. Yet in four of the cases in question it was the exercise of just such a prerogative that led to dismissal.

Loyalty to the institution should also be distinguished from loyalty to those temporarily managing it. It is doubtful whether loyalty to an institution should be a requisite of tenure at all; certainly to require loyalty to its officers is completely unjustified. It should be made clear that neither "grave misconduct" nor "moral turpitude" includes disloyalty to the administration or board of a university. Indeed, the issue of loyalty is irrelevant if a teacher is carrying out his duties properly. Of course, a responsible teacher must exercise his judgment in making criticisms either public or private—but surely poor judgment and lack of restraint reflect more upon a teacher directly than upon those he criticizes. University authorities should be content to rely on the same defences as other individuals have, the law concerning libel and slander. One may observe that if faculty members participated fully in university government the frustration that often generates intemperate criticism would be greatly lessened.

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[20] Ibid.

Remedies for Wrongful Dismissal

In the *Wilson*[21] case the court held that Professor Wilson had been wrongfully dismissed. What kind of remedy ought he to have for the injury suffered? In our legal system the ordinary remedy for a wrong suffered is an award of money damages as compensation. Such a remedy is not always adequate: a professor dismissed from his position is more interested to have the wrong undone as far as possible than to receive a sum of money. He would prefer to be reinstated to his position and receive his rightful salary.

Generally speaking when a person is wrongfully deprived of a public office, say a town clerk, the court readily grants an order for reinstatement. In effect the court holds that the attempt to remove him was a nullity because the authorities acted beyond their powers. Accordingly a declaration by the court that the clerk was not removed and continues to hold his office is sufficient; he retains both his position and his salary. The same reasoning would apply to a teacher holding a position in a publicly owned university.

The problem is somewhat different in a private institution. A teacher's right to his position is based not upon the fulfillment of certain statutes and regulations but upon his contract of employment. Ordinarily a court will not order *specific performance* (reinstatement) of a contract of personal service. The reason makes good sense in many circumstances: an order for specific performance is backed by threat of imprisonment for contempt of court should the defendant refuse to carry it out—he does not have the alternative to pay compensation instead. To order personal performance of a contract would be tantamount to servitude, as for example, by forcing a man to work on a job for six months as he had previously agreed, under pain of imprisonment for refusing. In these cases the court holds that even though the plaintiff has been wronged by the wilful refusal of the defendant to carry out his obligation the plaintiff must be content with money damages. Further, it has sometimes been held that this rule is mutual in its effect: if an employee cannot be forced to work for his employer, his employer cannot be forced to employ him. Universities have raised this argument in the United States with some success, and it was also raised in the *Wilson* case. The argument may make sense in situations where the relationship is personal, as between a craftsman and his

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[21] Re Wilson, footnote 15, *supra.*

apprentice, but it is without merit in a large institution like a university. There is no legal principle that demands that a remedy must always be mutual; the law contains many instances where remedies are not mutual. It is quite reasonable that a man should not be forced to work for a corporate institution but only be made to pay damages, while the institution may be forced to reinstate him if he has been wrongfully dismissed. The *Wilson* case so decided:

> Then it was said that the applicant [Wilson] had another remedy,—that he could sue for damages for wrongful dismissal;—a remedy of that kind does not seem to have been considered so adequate, certain and specific as to induce the court to refuse reinstatement in the cases which I have cited.[22]

Accordingly the court ordered the reinstatement of Professor Wilson.

It may be argued that the college at Windsor was a public institution and that the case does not assist the situation at private institutions. But all our colleges and universities today are more "public" than was the college at Windsor. Practically all are incorporated by statute, as was the college at Windsor, or have received a charter from the Crown, and all receive substantial public funds. It is doubtful that any Canadian university could carry on for one term without the extensive provincial and federal grants it receives. In any event the court in the *Wilson* case did not base its decision upon Professor Wilson holding a public office but upon his having tenure. It said simply that since he had been wrongfully removed and that damages would be inadequate compensation he ought to be reinstated. There may be some doubt, but on balance I believe that in Canada a university teacher who has express tenure and is wrongfully dismissed from his institution, whether public or private, could obtain an order for reinstatement.

Summary

"Informal tenure", that is, tenure implied by custom and usage has not been recognized by our courts; and it is unlikely to be recognized. Accordingly teachers at universities without formal tenure agreements probably have no legal protection whatever and may be removed at any time by receiving reasonable notice or payment of salary in lieu of notice. The maximum period the courts would probably require would be one clear academic year for senior professors and less time

[22] Ibid., at 200-1.

for teachers with ony a few years of service. In other words, the "tenure" of university teachers in most universities in Canada amounts roughly to a right to the same notice as any salaried yearly employee of a big business would be entitled to receive.

There is little to suggest, however, that Canadian courts would seriously entertain an argument that an institution's charter prevented it from granting tenure expressly. Even so, there is no general rule; each charter would have to be studied separately, but the courts would not favour a restrictive approach. And once tenure has been granted and a teacher has been wrongfully dismissed, he has a good chance to obtain reinstatement from the courts.

On the whole, the picture of our legal rights is an unhappy one. Indeed, if the legal picture were the whole story, the state of academic freedom in Canada would be intolerable. Happily, it is not the whole story. In most universities, a permanent appointment is considered by both staff and administration to give a security in practice that is absent in law. As with university government, however, the fact we have stumbled along without many serious crises does not make the present situation satisfactory. Far from it—those incidents that have occurred have in the end almost invariably turned out unhappily for the teacher involved. And as Professors Byse and Joughin have said, it takes very few instances of repression to poison the academic atmosphere and stifle freedom. The dangers inherent in the present situation, especially in view of the growing dependence on government grants and the inevitable temptation to interfere with university government and life, justify what might otherwise be a presumptuous proposal of certain reforms in the next part of this paper.

PART III CREATION OF TENURE

Value judgments on the specific requisites for attaining tenure are beyond the scope of this paper. Opinions vary greatly on whether two, three, five or seven years is the proper length for a probationary period. A wide divergence of opinion exists also on whether the length of the probationary period should vary according to the rank at the time of hiring or when promotion occurs within the probationary period. I have already expressed my opinion on the need for a positive act to acquire tenure as opposed to mere acquiescence in the re-hiring of a teacher.

Two other aspects of the creation of tenure remain to be discussed. First, who should make the decisions concerning tenure? In acquiring tenure a teacher attains a permanent place on the university staff and a long-term interest in the welfare of the university. Accordingly, a decision on his acquiring tenure should not be made by a purely administrative committee. A committee that decides whether to grant tenure should be composed principally of other members of his department already holding tenure, or, if the department is relatively small, then of teachers holding tenure within the same faculty.

Secondly, where should the regulations concerning tenure be found? There are at least three possible answers: (a) Regulations could be set out in detail as part of the terms of the original contract of hiring, although each contract may vary in salary and length of probationary period for a teacher according to his status at the time of hiring. This contract would govern his relations with the university during both the probationary period and after acquiring tenure. (b) Locally faculty associations might bargain with the university administration to agree upon a uniform employment and tenure agreement. Such an agreement, like a collective agreement in Canadian industry, would be brought to a teacher's attention and would apply to him automatically when he is hired. It could be varied in the individual contract only to give additional benefits to the teacher hired, but not in any way to detract from the rights set out in the collective agreement. (c) After appropriate consultation with its staff a university could arrange either to have its charter or statutes amended, or under its existing charter or statutes, to pass a series of regulations containing a comprehensive set of employement and tenure regulations. Again, these would apply automatically to each teacher as he is hired, subject only to extra benefits for which he may bargain as a condition of coming to the university.

Method (a), while having the advantage of simplicity, has the disadvantage of not being subject to any form of supervision or public record; through the years it could disintegrate under various pressures and changes in the administrative staff. Method (b), while meeting this objection, operates in a manner similar to industrial agreements and may be opened to the objection by a substantial number of teachers and institutions of being inappropriate to a university community. My own preference is for method (c). It has been suggested that method (c) comes close to creating the "status" of a university teacher, that is, that simply by accepting a teaching or research position a teacher

automatically acquires the rights and duties set out in the university regulations. It is relatively unimportant, however, whether a university teacher feels he acquires his rights by status or simply by entering into a contract. The result is substantially the same.

What should be the substance of such regulations? In the first place, they should contain a detailed statement concerning the length of the probationary period and the method by which a teacher will be considered for tenure. They should state such things as whether a committee will automatically consider his application at the end of a probationary period or whether he must apply. Secondly, they should state the period of notice required by a teacher if he should decide to leave his position at the university either during the probationary period or after he has acquired tenure. Thirdly, the regulations should set out the rules concerning such matters as sabbatical leave, leave of absence, independent research and publication, and the use of university facilities for research and publication. Fourthly, they should set out the rights and duties both of the teacher who has acquired tenure and of the university. These rights and duties should be set out as clearly and in as much detail as possible without, however, creating too rigid a scheme. In particular, the reasons that a university may invoke to dismiss a teacher who has tenure should be set out as precisely as possible. We have already noted some of the problems in this respect; it would be idle to claim that it is a simple task to set out the reasons for dismissal. The regulations should also state clearly and comprehensively the procedures that must be followed if the university's administration should decide to proceed with dismissal of a teacher who has acquired tenure. I am particularly concerned with this last aspect and believe that dismissal procedures *must* be set out in great detail. The next part of this paper is devoted entirely to the subject. I believe that a careful reading of it will make its importance self-evident.

PART IV PROCEDURE TO SAFEGUARD TENURE

Once a university administration decides to proceed with dismissal of a teacher, a grave situation exists: the career of the teacher may well be in jeopardy. In these circumstances he is entitled, indeed, he ought to be able to rely on the protection of the law. But legal protection has real meaning only in terms of the procedural safeguards available to him. For example, a right not to be dismissed except for just cause is of little value if the party that decides what is just cause is given an absolute discretion in reaching its decision. Once the discretion is

exercised adversely to the teacher, the courts may be powerless to interfere. Indeed, such unfair procedures are worse than no procedure at all: if tenure is granted and no procedure is set out, a court will lay down what is necessary itself. Failure to meet the standards set down by the court will make a dismissal improper. On the other hand good procedures properly followed obviate the need for interference by the courts. A court will not substitute its opinion for that of a properly constituted and functioning body within the university. And in most cases both sides will accept its decision more willingly.

The focal point of any process of dismissal is a hearing. The simplest description of it is that it should be a *fair hearing*. This phrase includes several basic qualities and is rooted deep in our legal tradition and development, with good reason. As we stated in the *Wilson* case, the many English decisions there reviewed had established that before a man may be deprived of his property or of a position of tenure he has a right to be heard in his own defence. The result in the *Wilson* case was based on a finding that a proper hearing had not been held. The court did not decide whether Professor Wilson had been guilty of conduct which would justify the board in dismissing him; it simply ordered his reinstatement because he had not had a fair hearing.

The requirements of a fair hearing have been painstakingly worked out over many years in Anglo-American law. I have attempted only to adapt them to our needs and in so doing have used as a basis the best model available, the procedures recommended by the American Association of University Professors. In substance my commentary follows their procedure with appropriate changes in terminology and emphasis for Canada.

The Hearing

What amounts to a fair hearing? There are eight main characteristics, three of which are absolutely essential. I shall defer consideration of the most important one—who should sit in judgment—until the end of this part, because it is best discussed in terms of several of the other characteristics.

1. *Notice of the charges against the teacher and of the time and place of the hearing.* This information is obviously necessary, but there is room for argument about how fully the charges should be set out, and how much time should be given a teacher to prepare for the hearing. The charges, and the evidence upon which they rest, should be set out

clearly enough to enable the teacher to collect evidence to refute them; he should have a minimum of, let us say, two weeks in which to do so. It follows that those making the charges should be limited at the hearing to adducing evidence and giving reasons for dismissal based on those charges and on no others. Until the charges are proved the teacher must not be suspended or dismissed unless the nature of the charges discloses a situation where he may endanger himself or others by continuing to work. In any event he should retain his right to salary until such time as the charges are proved.

2. *Right to appear at the hearing and to confront his accusers.* A hearing without the accused person present is not a hearing but merely an investigation. Similarly, a charge brought without the accuser being present or identified is not a charge but a rumour. A person who feels strongly enough about charges to bring them in order to have a teacher dismissed must make the charges himself at the hearing, unless it is physically impossible for him to do so. In any case he must be named at the hearing in the document containing the charges. To keep the name of the complainant secret for reasons of embarrassment or awkwardness is inexcusable when the professional career and livelihood of the teacher are at stake. Inevitably there are pressures from complainants to remain in the background and to have others do the unpleasant work for them. But charges may appear in a different light when the accuser is known. The knowledge that he must make his statements personally at the hearing will make a complainant consider more carefully the making of the charges. Most important, it is more difficult to refute charges without knowing their source.

3. *Right to counsel.* Arguments are sometimes advanced that if lawyers are allowed in they will turn the hearing into a technical battle and the real issues will be obscured. Even if this danger exists, it is difficult and unfair to require an accused teacher to espouse his own cause. He is too involved emotionally—too much is at stake for him to make his case properly. The very qualities of personality that may have led to the charges may also lose him the sympathy of the hearing committee. A more detached approach is necessary. Some United States colleges restrict counsel to persons other than lawyers. Such a provision is better than not permitting counsel at all, but it contains a strange reluctance towards complete fairness. Good lawyers are trained to argue relevant issues and to protest when irrelevancies are introduced solely to prejudice the position of the accused teacher.

If lawyers are excluded it may be difficult for an accused teacher to find a suitable person to act as counsel. A complete outsider to the university without legal training would probably not appreciate the issues at stake and would certainly be ill-equipped to cope with them. A fellow member of the staff may be embarrassed to undertake the defence—the prejudice of his own position at the university would loom large to him. Lawyers are more accustomed to defending unpopular causes. In any event a teacher should not be precluded from having the best counsel possible when his career hangs in the balance.

4. *Right to cross-examine.* This right is closely related both to confrantation of the accuser and the right to counsel. Cross-examination of adverse witnesses, especially the person making the accusation, gives the opportunity to expose contradictions and to elicit further facts which may explain the accused teacher's conduct in a more favourable light. Even the most truthful witness may subconsciously suppress aspects of his evidence which would weaken its effect. The impartial approach of counsel, especially if he is legally trained to look for bias and for failure to disclose the whole truth, is more likely to succeed than an anxious attempt by the accused teacher.

5. *Written statement of findings of fact and reasons for the decision.* If a teacher obtains a favourable decision, it may be important to him to have a statement that the charges have not been substantiated. Otherwise it might appear that he was merely forgiven. If he is found guilty of the charges but the committee has decided that they are not so serious as to warrant discharge, then this finding too should be made known, for it will help to clarify the bounds of permissible conduct.

Most important, if a teacher is found guilty and is discharged he is entitled to know why; the reasons may not be precisely the same as those in the charges. The committee's reasons may be critical when the teacher seeks re-employment. A particular cause of dismissal which may be sufficient, let us say at a sectarian college where adherence to certain articles of faith is important, may have little significance at another institution. A dismissal without findings may lead prospective employers to fear the worst about the dismissed teacher. And where the reasons cast serious aspersions on the abilities or fitness of a teacher, then he receives only justice; if a prospective employer inquires of the institution which dismissed him, it is better that they should be aware of the reasons. Lastly, if there is an appeal procedure, findings of fact and reasons for the decision at the hearing are essential if either side is to have an opportunity to dispute them.

6. *Right of teacher to appeal.* There is always a risk that the atmosphere of the hearing may be tense and trying; it may distort the judgment of the committee and its procedures. As a result the hearing may be improperly conducted without due regard for the rights of the accused teacher, or the committee may misinterpret the scope of the grounds for dismissal. A subsequent calm argument on appeal may restore perspective to the dispute and limit the argument to the true issues. For such an appeal to be effective it must be based only on the record—on the charges made, the reply by the teacher, the evidence presented at the hearing, the argument, and the reasons for the decision of the hearing committee. Accordingly, it is necessary to have as a seventh element, to carry on an appeal, a full transcript of the hearing.

7. *Right to a full transcript of the hearing.* The university should provide a full stenographic record of the hearing and make it available to the teacher at the time the committee makes its decision. He should be free to take it away with him and study it, although it might be quite proper to require him not to disclose its contents to anyone except his counsel, until the appeal is heard.

The question of privacy is an important one but it is difficult to lay down any general principles. In most cases it is probably wise to hold the hearing in private. Only the parties, their counsel and witnesses should be permitted to attend, except by agreement among the parties and the committee. If after the final disposition of the matter the teacher is cleared, then all parties should be bound to secrecy. If, however, the teacher is dismissed he should have the right to use both the transcript of the hearing and the reasons for dismissal in his best interests to obtain new employment. Since these procedures assume that a fair hearing has been held, it would be just to bind the teacher to silence as far as the press and other news media are concerned. The teacher has had his chance to clear himself; to drag the issue into public view afterwards could only harm himself and the institution.

8. *Composition of the hearing committee.* A basic principle of law is that a man should not be judge in his own cause. If a judge is an interested party he is necessarily disqualified for he cannot give an impartial decision. In most circumstances dismissal charges are brought by the president who is usually supported by his board of governors. If the president, deans or members of the board of governors comprise the hearing committee, or even part of it, the whole careful procedure outlined above goes for naught. Despite all the other procedural safe-

guards, if these men sit in judgment, the process becomes one of an employer listening to an appeal for mercy from his employee.

The hearing committee should be composed of the teacher's peers —a committee of professors having tenure, chosen by the local faculty association. The detailed composition of the committee and whether it should be a standing or *ad hoc* body is a matter for individual decision within each institution. The cardinal principle is that it should not contain members of the university administration or governing body. Unfortunately, as we shall see when we examine the tenure provisions in several of our universities, not one institution yet observes this precept.

The composition of the appeal body is less clear. A strong argument can be made that the governors, who must take ultimate responsibility for the decisions of the institution, must also make the final decisions.Even assuming no appeal were requested by the teacher, a decision of the hearing committee to dismiss him would require formal approval by the board. Thus, the argument goes, a final appeal must be to the board itself or to a committee of the board. Undoubtedly, it would be more just for the appeal to be heard by an arbitrator appointed from outside the university, but it is probably unrealistic to expect any of our institutions to give up the ultimate power of decision of the board. If so, then it is all the more important that the board should contain adequate faculty representation in order to give impartial judgment.

Even in the absence of so desirable an arrangement, however, if the original hearing has complied substantially with the requirements suggested, and if the appeal is based strictly on the record, the board will be well insulated from the influence of the administrative complainants—provided, of course, that the administrative officers observe the spirit of the procedures and do not seek the ear of the governors privately. If these conditions are observed the teacher will be reasonably well protected at the appeal. The appeal committee should overrule the decision of the hearing committee only if the hearing was improperly conducted, if the charges were not proved, or if the hearing committee did not understand the grounds for dismissal.

Informal Mediation

One may object after this lengthy resumé of procedural safeguards that the resultant hearing resembles a criminal trial. It does, and the

reason is simple—to dismiss for a cause a teacher who has tenure is as serious for him as a criminal conviction. In all probability it will destroy his professional career and perhaps even make it difficult for him to obtain a position in a different vocation. Accordingly he is entitled to every reasonable opportunity to meet the charges against him and to clear himself.

If we may assume that no one favours such a hearing with all its unpleasantness and implications, we should try to avoid the need whenever possible. To this end we should insist upon preliminary procedures for informal mediation and settlement. Either before formal charges are made against a teacher or, at the latest, after he receives them but before a hearing is arranged, a meeting should be required between the teacher and a senior member of the administration. A mediator, a senior professor without any interest in the dispute, should also be present. Settlement is much more flexible than formal judgment by a hearing committee. A committee can decide only whether dismissal is justified or not. In a settlement other alternatives are available. When his sins are brought directly to his attention a teacher may express willingness to reform and to give an apology if required, or he may agree to a lesser form of punishment than dismissal, such as loss of seniority or the surrender of extra duties which provide additional income. On the other hand, if the administration is determined to have the teacher removed it may agree to give fair compensation and reasonable references if the teacher will resign. In any event, such a meeting can do no harm and may avoid a full scale hearing.

Effects of a Formal Hearing

One final observation about a formal, full scale hearing: once it has been set in motion and a teacher is found guilty of grave charges, the consequences for him are far more serious that if he were simply dismissed without any procedural safeguards. Without a formal finding he could claim that his dismissal was "political", that he was a scapegoat for others, and similar excuses. These safeguards, which assist the wrongly accused teacher, help condemn the guilty prevaricator who might otherwise never be found out in a clearcut manner. It follows that a teacher who is guilty of serious misconduct will be better off, when confronted with the charges, to go quietly than to put into motion the machinery to find him out. Formal procedures destroy the questionable advantage of having only a vague stigma accompany dismissal.

PART V

REVIEW OF SOME CURRENT TENURE REGULATIONS

In the light of our discussion on procedures we may examine several current sets of regulations to see how they measure up to the desirable standards for protection of tenure.

Institution "A"

The provisions of this institution are terse. The appointment of a teacher "without term" creates "tenure in the sense that his services shall be terminated thereafter only for adequate cause, except in the case of retirement for age, total disability or under extraordinary circumstances because of financial exigencies." If proceedings for termination are stated against a teacher with tenure he "shall be officially informed before the hearing of the charges against him and shall have the opportunity to be heard in his own defence by those concerned with the case. He shall be permitted to have with him an adviser of his own choosing, who may act as counsel. There shall be a full stenographic record of the hearing available to the parties concerned."

The statement above, though brief, contains some of the essential elements of a fair hearing. Noticeably missing however are the right to confront his accuser, to cross-examine, to bring in witnesses on his own behalf (although the right to do so might be implied from the words "to be heard in his own defence") and to receive the reasons for the decision. Most important, however, the hearing body is the Board of Governors and there is no appeal. A hearing by the Board of charges brought by the president could be little more than a foregone conclusion.

Institution "B"

The "Staff Handbook" published by the institution states, "Appointments without definite term are assumed to be tenable as long as the duties to be performed continue to exist and the person appointed is judged to be discharging them satisfactorily, until the normal retiring age is reached." On dismissal it states, "Though the President must listen to reports on . . . its staff, from any quarter, neither he nor any other administrative official should make such reports the basis of action against a staff member without requiring that the report be put in writing and signed by the responsible person. Moreover, the staff member should be given an opportunity to reply and to appear before a Committee of the Board if he desires." The vagueness of the words

used, particularly the word "should", leaves us in doubt whether the statement creates contractual rights or merely suggests a procedure for the president to follow if he so chooses. In any event the rights set out are not as clear as those in the first example.

Institution "C"

"Administrative Regulations and Practices" published by the university states "Appointments to the ranks of Associate Professor, Professor and Dean are made without term. They are tenable as long as the duties continue to exist and the person appointed is performing them satisfactorily, until the normal age of retirement is reached." Under the heading "Resignations" there is a final sentence: "The University undertakes to give at least three months' notice of the termination of any appointment." If this last sentence means literally what it says, the university may dismiss any teacher without cause upon giving three months' notice; tenure receives no legal protection under these regulations. On the other hand, the sentence may refer only to term appointments that are not to be renewed (although the wording is inapt for this purpose); if so, then no dismissal procedure is provided for teachers with tenure and the situation is rather like that in the *Wilson* case. If a wrongfully dismissed teacher chose to press his legal rights he would have to convince the court that he had not had a fair hearing or was dismissed for inadequate cause.

Institution "D"

According to a 1958 report of the local C.A.U.T. branch at this institution, all persons are subject to dismissal by the Board of Governors "upon grounds of immorality, inefficiency, or for any administrative cause which in the opinion of its members affects adversely the general well-being of the university." In effect, no tenure.

Institution "E"

This institution has made a serious aatempt to create tenure protected by procedural safeguards. The provisions are too long to reproduce in full. In summary they set out the usual causes for dismissal and the following procedure when dismissal is contemplated: 1) The principal convenes a Faculty Consultative Committee comprised of the deans, the senior academic member of the senate and the department head of the teacher involved unless they are one and the same person. 2) If it is satisfied that there are grounds for proceeding further (the statement does not say what happens if the committee

does not wish to proceed further but the principal does), the principal *as chairman* shall notify the teacher and the president of the faculty association, and invite them to appear before the committee. 3) If the committee decides to proceed yet further it then presents formal charges, which the teacher may choose to contest before a second committee, the Faculty Tenure Committee comprised of the principal, the deans, all department heads, the president of the faculty association and two members of the teaching faculty named by the accused teacher. This committee elects its own chairman and sets its own procedure. 4) The teacher has the right "to present relevant evidence and to examine witnesses, and to address the Committee after all evidence has been presented." 5) There must be a record of the proceedings. 6) The committee must present its report within seven days. 7) "If the Principal takes the matter to the Board of Regents he must furnish the Board with copies of the report, in which case the faculty member shall be invited to attend the meeting for the purpose of making such representation as he may wish."

This interesting document falls short on several accounts. First, there is no right to counsel. Secondly, the right to appeal seems to be one-sided. Although the principal may take the issue before the Board there is no suggestion that the teacher may do so. It is not clear whether a dismissal proceeding must go to the board eventually or not. Thirdly, the second commitee, the Faculty Tenure Committee, contains almost the whole of the first committee, the Consultative Committee, and particularly the dominant personalities of the principal and the deans. If there was any intention that the second body should hear the dispute afresh its composition makes it impossible to do so. Fourthly, the appointment to the Tenure Committee of two members chosen by the teacher changes the committee from a judicial character to one of a mixed arbitration board. Arbitration in the mixed form, often used to settle labour disputes—an "arbitrator" who is really a protagonist, for each party, and a third impartial member who really casts the deciding vote—may be suitable to the kind of compromise needed in such circumstances but has no place in a judgment on academic freedom. Even as a mixed arbitration board it is improper; the teacher can expect two champions nominated by him, at most three, if we include the faculty association president, whereas the administration has many representatives. Fifthly if, despite its non-judicial composition, the committee is to be considered as a judicial body we are back to the fundamental failing that the principal and his fellow administrators are judges in their own cause.

Not withstanding these criticisms, the attempt to provide for a fair hearing should be commended—it tries to do so in detail and with care. It does not, however, succeed.

Institution "F"

The Faculty Association of this university is negotiating with its Board of Governors for a comparatively detailed set of regulations following more closely the American Association of University Professors' model. It also includes a preliminary conciliation procedure. There are, unfortunately, several features which fall short of the desirable standard.

First, the hearing committee decides whether the parties may be assisted by counsel. The committee is not the proper body to make such a decision; it is a decision for the accused teacher and for him alone to make. Otherwise the committee is in a sense prejudging the issues in the case by stating whether there is a need for counsel. Almost invariably an accused teacher would choose to have counsel. In my opinion a denial by the hearing committee of a request by the accused teacher to have counsel represent him would be a denial of a fair hearing.

Secondly, although a complete transcript of the hearing "will be made" there is no statement on its availability to the teacher, and the right to a copy is not necessarily implied; it could be argued that the university requires the transcript for its own purposes for examination by the Board of Governors before making a final decision. This failure to give a dismissed teached a right to the trancript of the hearing would handicap him severely in any right of appeal that he might have or perhaps in obtaining a new position.

Thirdly, the proposed plan contemplates independent action by the president, regardless of the decision of the hearing committee. The last clause of the regulations states, "If the President proceeds to make a recommendation regarding dismissal to the Board of Governors, he will transmit to the Board the full report of the Hearing Committee. If the final recommendation of the President to the Board of Governors is not in accord with the findings of the Hearing Committee, the Board will meet with the Hearing Committee before coming to a decision." As a result of this clause, the whole procedure and decision of the committee is reduced to a mere recommendation to the board, rivalling that made by the president; the board makes the first and

only decision on the case, from which there is no appeal. Thus the elaborate framework for a fair hearing is emasculated. Since this procedure is recommended by the faculty association itself it comes as a great surprise.

I suggest the following changes: the president should have no power to make recommendations to the board before the teacher has had his hearing. If the hearing is adverse to the teacher and he does not wish to appeal then the president takes the decision to the board to make the dismissal formal. If the teacher wishes to appeal to the Board he should receive a further hearing before it, based solely upon the transcript and the decision of the hearing committee. The president should have no right to make representations to the Board on the matter except at the hearing of the appeal, when he would be entitled to oppose the appeal. If the Hearing Committee decides favourably for the teacher the president should not be able to make independent recommendations to the Board. At most he should be able to appeal from the decision of the hearing committee to the Board;[23] again, his representations should be confined to the hearing itself, where the teacher should be permitted to defend the decision of the hearing committee. There is no need to bring the hearing committee before the board for it is not a party to the dispute. Any attempt to get it to reverse its decision would be highly improper.

Institutions "G" and "H"

These two new sets of regulations seem to show an absence of contact with the outside world. They are unaware even of the relatively unsatisfactory attempts made by other Canadian universities. University "G" states "members of faculty will become eligible for appointment 'without term' three years after initial appointment as professor, four years after initial appointment as associate professor and seven years after initial appointment as an assistant professor. Appointments 'without term' will not be given automatically . . ."

Proposals for university "H" state, "A person who remains on the Faculty of . . . after the required probationary period is deemed to

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[23] If the president has any right to appeal it should be limited to cases where the teacher has been found guilty of the charges but the hearing committee has decided that the conduct does not amount to adequate grounds for dismissal. The president could then appeal the committee's interpretation of adequate grounds. If the hearing committee finds that the teacher has not committed the acts charged, their decision should be final and should close the matter, as would happen in criminal proceedings.

have tenure. The committee on academic activity (consisting of members appointed from the administration and faculty) will investigate all complaints concerning infractions of tenure and make recommendations to the President."

Here again since tenure is expressly created in both universities and since no description or procedural rights are set out, the extent of protection available to a dismissed teacher would have to be decided by the courts.

Institution "I"

The Faculty Association of this university is, to the best of my knowledge, the only one in Canada that has recommended to its Board of Governors the adoption of a dismissal procedure that substantially meets all the requirements of a fair hearing. The submission to the Board of Governors was made in 1959. Since that time the institution has undergone a change in status and organization and there is no indication whether these recommended procedures have been adopted.

* * *

The regulations we have examined, especially those drafted by faculty associations as their desirable ideal, display a confusion of ideas and functions concerning dismissal procedures. In particular, the confusion of roles of the university administrators and boards of governors —acting as both prosecutors and judges—suggests a certain timidity in facing up to an open contest between teacher and university authorities. In some ways this attitude is admirable, for it suggests a basic unity of purpose and trust. But it also indulges in wishful thinking. Once a dispute reaches the point where the administration seeks to dismiss a teacher with tenure, the battle *is* joined. If the teacher is to have his tenure safeguarded properly, if the battle is to be a fair one he is entitled to *all* the elements of a fair hearing. The battle is never an equal one; the resources in power, money and political acumen of the board are always in overmatch for a teacher,[24] unless he is able to resort to foul tactics through rumour or yellow journalism—or he receives a fair hearing. Surely the latter is preferable.

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[24] The CAUT has on a number of occasions assisted individual teachers in their difficulties, and will no doubt continue to do so.

LA STABILITE DE L'EMPLOI DANS LES UNIVERSITES CANADIENNES*

Rapport préparé par Daniel A. Soberman, Faculté de Droit, Université Queen's.

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8. Composition de la commission d'audience.

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PARTIE V Revue de certains règlements actuels touchant la titularsation

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* La plus grande partie de l'étude de M. le Professeur Soberman s'applique apparemment à l'ensemble des Universités du Canada, mais la partie juridique n'a prait qu'au droit coutumier.

PARTIE I PRECISION DU TERME

Sens de l'expression

Qui dit "stabilité d'emploi" évoque aussitôt toutes sortes d'idées ou d'idéaux assez vagues, tant dans l'esprit des universitaires que dans celui du commun des mortels. Les uns y voient la sécurité indispensable à l'exercice de la profession, en toute liberté et sans crainte de représailles, que celles-ci prennent la forme d'un congédiement pur et simple ou d'une diminution de traitement imposée par l'autorité qui tient les cordons de la bourse. D'autres, au contraire, y voient une raison d'abdiquer ses responsabilités, de se réfugier derrière les murs de l'université, de se comporter en eccentrique sans égard à une juste hiérarchie des valeurs. Pour d'autres encore, l'expression évoque la sinécure, la fin des efforts, le début d'une vie fainéante. En fait—et je m'en suis rendu compte en préparant cet article sous forme de rapport au comité compétent de l'Association—c'est la boîte de Pandore.

Ce n'est qu'à un seul et unique point de vue que la réaction à mon rapport a été la même. Tous ont convenu que l'expression "stabilité de l'emploi" (ou *tenure* en anglais) était beaucoup plus riche de sens variés que je ne l'avais dit. Il m'a pourtant été impossible de satisfaire tout le monde. Ayant cherché, mais sans succès, à en arriver à une définition complète de l'expression, à la placer dans une perspective correcte, je me suis contenté d'une description sans prétention destinée à bien cerner la question au départ. C'est celle que l'on trouvera dans l'ouvrage des professeurs Byse et Joughin: *Tenure in American Higher Education.*

> . . . la caractéristique essentielle de la stabilité de l'emploi, c'est le caractère de permanence de celui-ci dans le temps, en ce sens que l'institution au service de laquelle se trouve le professeur aura, d'une façon ou d'une autre—soit en s'astreignant à une obligation d'ordre juridique, soit moralement—renoncé à la liberté ou à la capacité qu'elle aurait autrement de mettre fin au dit service.[1]

Les points de vue que d'autres pourront avoir au sujet de cette conception de l'expression, ou les réserves qu'ils aimeraient formuler à cet égard, se retrouveront ailleurs dans le présent *Bulletin*, fort bien exprimés.

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[1] Byse and Joughin, *Tenure in American Higher Education,* p. 2. Ithaca, N.Y.: Presses de l'Université Cornell, 1959.

Pourquoi la stabilité de l'emploi est-elle importante? Elle ne se fonde pas uniquement sur l'intérêt égoïste du professeur, pas plus que sur la sollicitude ou la bienveillance que doit avoir pour lui la collectivité dans son ensemble. Malheureusement, certains magistrats ont eu pour les professeurs une attitude légèrement dédaigneuse. Ce sont pour eux de pauvres malheureux qu'il faut traiter avec patience et ménagements. En voici un exemple tiré d'un jugement de M.le juge Dysart, au Manitoba:

> La raison pour laquelle il importe d'assortir de réserves le droit de mettre fin à l'emploi est à la fois juste et facile à comprendre. C'est que le professeur est un homme spécialement formé à sa tâche qui trouvera difficilement à s'employer ailleurs à une place qui lui convienne, s'il perd son emploi. Sa formation de spécialiste le prépare mal à exercer un métier d'intérêt plus général. Dans son domaine propre, les avantages matériels sont maigres, relativement parlant. Pour que cette noble profession puisse donc attirer à elle de nouvelles recrues il est sagement reconnu, en théorie comme en pratique, que l'université qui les emploie leur assure une stabilité d'emploi voisine de la permanence. Cela suppose, en ce qui concerne l'attitude à prendre vis-à-vis le comportement général du professeur, de la justice, des ménagements, voire de l'indulgence . . .[2]

Mais les professeurs Byse et Joughin donnent, de l'importance de la stabilité de l'emploi, une tout autre explication:

> . . . les professeurs d'université, dans notre société, sont revêtus d'une responsabilité d'un caractère tout particulier. C'est à eux qu'il incombe de développer chez l'étudiant l'esprit critique. Il faut encore qu'ils mettent à leur disposition la sommes des acquisitions du passé, qu'ils repoussent plus loin les frontières du savoir, qu'ils mesurent la valeur des institutions existantes et recherchent leur amélioration ou leur remplacement à la lumière de la raison et de l'expérience. Si donc on veut qu'ils s'acquittent de ces tâches indispensables, il importe de ménager le droit à des recherches et à des débats parfaitement libres . . . [On trouve ensuite dans le texte la citation suivante du professeur F. Machlup.] En ce qui concerne certaines occupations, il en va manifestement de l'intérêt de la société que les intéressés puissent donner leur avis sans crainte de représailles (. . .) La profession du commun des mortels n'est pas, en général, intimement liée à leur pensée ou à leur parole. Mais le travail du professeur, c'est précisément

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[2] Smith v. Wesley College (1923) 3 W.W.R. 195, à 202.

de penser et de parler. S'il perd sa situation pour avoir écrit ou dit quelque chose il faudra, en règle générale, qu'il renonce à l'exercice de sa profession de sorte qu'il ne pourra plus révoquer en doute ou lutter avec quelque chance de succès contre les idées reçues. Et si *quelques* professeurs perdent leur situation pour ce motif, l'effet sur un grand nombre de leurs collègues sera tel que leur utilité, tant du point de vue de leurs étudiants que de celui de la société, en sera gravement compromise.

[Le texte poursuit]: Ainsi donc, s'il y a préjudice grave et permanent attribuable à ces restrictions apportés à la liberté du professeur et à la stabilité de son emploi, celui-ci n'atteint pas seulement le petit groupe de professeurs directement mis en cause. C'est la société tout entière qui aura à en souffrir car ceux qui, en définitive, profitent de cette liberté ne sont pas seulement ceux qui l'exercent, mais la population dans son ensemble. Il convient de le souligner: la liberté du professeur et la stabilité de son emploi ne sont pas fondées sur les ménagements particuliers qu'il y a lieu d'avoir pour les être humains qui professent dans nos universités. Elle doit exister, plutôt, pour que le société puisse profiter du jugement honnête et des critiques libres qui, autrement, ne pourraient peut-être pas s'exprimer de crainte d'offenser un groupe social dominateur ou une idée provisoirement reçue.[3]

Certains critiques doutent que la stabilité de l'emploi soit effectivement une condition *sine qua non* de la liberté universitaire. Certains auteurs ont prétendu aux Etats-Unis qu'elle consacrait la médiocrité et favorisait l'indifférence chez ceux qui en sont les bénéficiaires.[4] Dans l'ensemble, néanmoins, l'opinion est en très grande partie favorable au point de vue exposé ci-dessus. En Grande-Bretagne on a peu discuté la question dans des écrits. Au Canada, où les écrits sont également rares, on a généralement supposé que la stabilité de l'emploi était une bonne chose en soi, sans plus.

On ne doit pourtant pas se dissimuler que des universitaires de qualité médiocre obtiennent des sinécures dans nos facultés. Mais cet état de chose est moins attribuable à la stabilité de l'emploi qu'à l'insuffisance des méthodes de recrutement, qu'à la pénurie de maîtres compétents et qu'au fait qu'on se refuse à mettre à la porte des professeurs de deuxième ordre à la fin d'un stage d'essai. Réduire dans

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[3] Byse and Joughin, p. 3, passage tiré de "On Some Misconceptions Concerning Academic Freedom", de Fritz Machlup, *AAUP Bulletin* 41: 756 (1955).

[4] Voir, par exemple: Edgar F. Borgatta, *The Annals of the American Academy of Political and Social Science,* Vol. 325, p. 142 (1959).

toute la mesure du possible le recrutement et le maintien en fonction de maîtres incompétents pose un problème difficile à nos universités—comme d'ailleurs à l'Etat ou aux autres grandes institutions—problème dont on ne peut guère espérer qu'il soit jamais résolu. On aurait tort de s'en prendre aux présidents ou recteurs, aux doyens ou chefs de département. Il y aurait mauvaise grâce à leur reprocher de ne pas agir pour se débarasser du bois mort intellectuel. En vérité il y aurait tout lieu de s'alarmer s'il prenait fantaisie aux présidents d'université de se comporter comme le font parfois les dirigeants de grandes entreprises commerciales lorsqu'ils s'installent dans leurs nouvelles fonctions et entreprennent de transformer leur compagnie. La société doit peut-être accepter de payer la rançon que suppose l'existence en son sein de vastes entreprises collectives ou l'ancienneté et le formalisme des processus d'avancement prennent le pas sur le mérite et la souplesse.

On a proposé, pour assurer des normes élevés de compétence chez les professeurs, que le principe selon lequel la stabilité de l'emploi serait uniquement fonction de l'ancienneté soit remplacé par une méthode où serait exigée, outre un stage d'essai minimum, soit la présentation d'une demande de titularisation (stabilité de l'emploi) par l'intéressé soit la tenue d'une réunion groupant les personnes spécialement chargées de se prononcer à cet égard. Il s'agit de faire du ré-engagement décidé à cette réunion un acte de caractère réfléchi. Ainsi, par exemple, la commission de titularisation groupant des membres principaux du personnel enseignant devrait obligatoirement se réunir au plus tard pendant le premier trimestre de la troisième année du postulat. A l'issue de cette réunion, il devrait être communiqué au stagiaire un avis dans l'un des trois sens suivants: a) que la stabilité de l'emploi lui a été accordée; b) que son contrat sera résilié à la fin de l'année universitaire; ou c) que son contrat de stagiaire sera, s'il le désire, renouvelé pour les deux années suivantes et qu'avant que la période en cause ne soit courue, il lui sera donné au avis selon les termes de a) ou de b) ci-dessus. Autrement dit, toute prorogation du stage serait interdite. Cette méthode obligerait la commission à prendre une véritable initiative; il ne serait pas question pour elle d'entériner sans discussion une décision de ré-engagement. Il suffirait d'un peu de courage pour éliminer ceux auxquels la tituralisation et, partant, le stabilité de l'emploi, ne devrait pas être assurée. En supposant qu'une fois celle-ci consacrée, elle serait conforme à des normes acceptables, il paraît intéressant d'envisager l'adoption de cette méthode qui présente l'avantage de prononcer la titularisation d'une façon positive. Il y a le plus grand intérêt à ce que les professeurs, non seulement cherchent à

se garantir contre le risque d'un congédiement arbitraire, mais cherchent encore à empêcher leurs universités de devenir le refuge des médiocres.

Rapports entre la stabilité de l'emploi et l'administration de l'Université

Les plus nettes divergences de vue se manifestent peut-être dans le domaine des rapports entre la stabilité de l'emploi et les autres aspects de la liberté universitaire. On convient généralement toutefois que cette stabilité, telle que nous l'avons définie, ne constitue qu'un aspect de cette question plus vaste. Etre protégé contre le congédiement, si important que cela puisse être, n'est qu'un des petits côtes des rapports que le professeur entretient avec son université. Il doit se préoccuper également, voire davantage, de l'enseignemnt qu'on lui confie, des moyens de recherche mis à sa disposition, de la nature des rapports qu'il doit avoir avec les étudiants antérieurement et postérieurement à l'étape du baccalauréat, du temps qu'il est appelé à consacrer à l'une et l'autre de ces catégories d'enseignés, du caractère et des talents de ses collègues, des projets d'agrandissement de son département, de ses fonctions administratives, sans parler du traitement, des chances d'avancement et des occasions de congé sabbatique.

Il est clair que ce n'est seulement en congédiant le professeur qu'on peut détruire la liberté universitaire. L'administration, incapable en droit de mettre à la porte un professeur titularisé, aura le choix entre diverses façons de lui rendre l'exercice de sa profession humiliant, sinon intolérable. On pourrait, par exemple, lui mesurer avec parcimonie les fonds dont il a besoin pour la recherche ou pour la rémunération de répétiteurs ou de correcteurs. Ou encore on pourrait l'empêcher de professer dans sa spécialite pour le confiner dans le rôle de chargé de cours spéciaux pour les étudiants de première année. Il risque aussi de se voir dépasser par d'autres membres de son département, du point de vue du traitement comme du point de vue du grade, même si tout le monde reconnait qu'il s'acquitte très bien de ses fonctions. Les quelques jugements des tribunaux sur la stabilité de l'emploi dont il est fait rapport dans les recueils de judisprudence montrent bien que ces méthodes ne sont ni sans précédent ni même invraisemblables.

Loin de moi la pensée, cependant, de prétendre que les administrations universitaires sont coutumières d'abus de ce genre. J'ai simplement voulu montrer que la stabilité de l'emploi, loin de constituer un problème isolé, doit être envisagée dans la perspective plus vaste des conditions de travail et de la vie universitaire en général. Nous en sommes fatalement amenés à conclure que la question de la stabilité de l'emploi et de la liberté universitaire sont intimement liés

à l'administration de l'université et que, de ce fait, assurer la stabilité de l'emploi dans son sens le plus large suppose que le personnel enseignant devra avoir une voix importante au chapitre pour tout ce qui concerne l'administration de son institution à tous les niveaux.[5] Aussi longtemps que le professeur en sera exclu, il restera à la merci des administrateurs à qui ses propos ne plaisent guère. Il n'existe aucune façon pratique d'étendre la portée de la garantie juridique accordée à la stabilité de l'emploi qui permette de réprimer de tels abus. Il n'y a qu'une façon d'y arriver, c'est d'autoriser les professeurs à prendre une part véritable à l'administartion de l'université, à garder la main aux commandes.

Cette thèse, qui se rapporte à la liberté universitaire de chaque professeur en particulier, doit être distinguée du principe plus général, mais également valable—auquel d'ailleurs il s'ajoute—qui veut que l'université ne se compose pas simplement d'un patron et d'un certain nombre de personnes à son service, pas plus qu'elle n'est une simple personne juridique telle une société commerciale. Il est inutile de citer ici des exemples historiques pour montrer qu'au Moyen-Age l'université était une "communauté de savants" (il y a grand danger à étayer une thèse valable pour l'époque contemporaine en invoquant des circonstances vieilles de six siécles et plus) car il est d'ores déjà assez clair que l'université est aujourd'hui beaucoup plus complexe qu'une société commerciale. Voir à ce sujet l'excellent exposé du professeur J. L. Montrose de Belfast.[6] Par exemple, dans une université canadienne, le bureau des gouverneurs ne fonctionne pas comme le conseil d'administration d'une entreprise commerciale. Ses attributions ne sont pas les mêmes. D'abord les gouverneurs sont, de certains points de vue, plus puissants en ce sens qu'ils n'ont pas à se reporter, pour les décisions importantes, à un groupe nombreux correspondant aux actionnaires de la maison. Dans les domaines où ils ont autorité pour agir leurs décisions sont sans appel. Ensuite ils sont moins puissants que les membres d'un conseil d'administration puisque leurs attributions ne s'étendent pas à tous les aspects de la vie de l'université. Le plus important de ces aspects, d'un certain point de vue, soit l'admissibilité des étudiants et la distribution des diplômes, est à peu près invariable-

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[5] A cet égard, "A Modest Proposal" de Murray S. Donnelly, mérite réflexion et un entier appui. Voir: *A Place of Liberty,* p. 143. Ed. Whalley, Toronto: Clarke, Irwin & Company Limited, 1964.

[6] J. L. Montrose, "The Legal Relation between a University and its Professors", *Universities Review,* Vol. 29, p. 44 (fév. 1957).

ment confié à un organisme proprement universitaire. Le bureau des gouverneurs n'est pas habilité à décerner des "grades mérités" autrement que sur avis conforme de cet organisme. En outre, la direction du programme appartient non aux gouverneurs, mais au sénat ou à un autre corps académique. On voit tout de suite en quoi cela se distingue du rapport classique patron-employé. Il serait rare en effet, dans notre régime capitaliste, de trouver un groupe d'employés dotés d'attributions législatives (c'est le cas par exemple des prescriptions relatives aux diplômes) administratifs ou judiciaires (comme lorsqu'il s'agit de décider qui a réussi ou qui a échoué).

Ajoutons que les étudiants ne sont pas de simples clients, mais bien plutôt, en quelque sorte, le produit fini, le but essentiel de l'université. Bénéficiaires des efforts de celle-ci, détenteurs de son avenir, ils constituent la société qu'elle dessert.

Il est donc acquis que l'université n'est pas formée par un patron et les gens à son service. Le corps professoral en est une partie intégrante. Il possède les connaissances intimes, les talents et l'intérêt qu'il faut pour participer intégralement et efficacement à l'administration de l'institution. Tant qu'il sera privé de ce droit, la collectivité universitaire s'en trouvera gravement lésée, l'efficacité et la caractère éclairé que doit revêtir l'administration en seront compliqués, voire rendus impossibles. La liberté académique, même dans les institutions où elle est consacrée juridiquement, résiste mal parfois aux périodes de crise. A défaut du sentiment d'une appartenance, d'une participation véritables—que les plus jeunes professeurs n'éprouvent qu'à peine—le moral et l'efficacité du personnel se trouveront compromis.

Bien que l'on ait conclu à l'importance égale de la participation à l'administration universitaire et de la stabilité de l'emploi, celle-ci ne prenant en définitive tout son sens que lorsque celle-là existe, il y aurait peut-être avantage à examiner isolément les problèmes attachés à la stabilité. C'est qu'elle resterait importante même dans les institutions où le corps enseignant participerait effectivement à leur administration. Une efficace réglementation à cet égard constitue une partie importante du régime tout entier de la liberté universitaire.

Faut-il protéger juridiquement la stabilité de l'emploi?

En définissant la stabilité de l'emploi au début du présent article, nous disions qu'une institution peut renoncer à sa liberté de congédier, soit juridiquement, soit moralement. Il en va de la stabilité comme de

bien d'autres choses. La loi n'est à cet égard qu'un des outils qu'on peut utiliser pour régler le comportement de l'homme dans la société. C'est d'ailleurs à l'occasion un mauvais outil qui, dans presque tous les cas, ne fonctionne bien que lorsqu'on l'utilise en tout dernier ressort. Les sanctions légales sont d'autant plus utiles qu'elles sont plus rarement invoquées, chacune des parties sachant que l'autre pourra se pourvoir devant les tribunaux si elle s'obstine à défendre un point de vue déraisonable sans espoir d'accommodement. En ce qui concerne la stabilité de l'emploi dans une université ces observations prennent une force singulière. Elle est d'autant plus efficace dans la pratique que les autorités universitaires reconnaissent qu'elle constitue pour elles une rigoureuse obligation morale et qu'elles le respectent.

A la vérité, on prétend parfois que la sanction des lois n'a pas sa place dans ce domaine, que le professeur doit pouvoir se contenter de la bonne volonté et du bon sens des autorités et que le recours aux tribunaux ne saurait constituer qu'une malencontreuse publicité pour le professeur comme pour l'institution.[7] Mais ce point de vue comporte deux difficultés principales. C'est précisément dans les cas ou le sens commun et la bonne volonté se sont perdus et ont été remplacés par l'amertume et la vitupération que le professeur a besoin d'être protégé. En outre—et c'est la seconde difficulté—le professeur qu doit compter sur la bienveillance de ses maîtres et qui se trouve désarmé devant eux devient servile. L'existence même d'une menace de santions légales lui permet ne négocier équitablement avec un bureau hésitant ou rétif. Les professeurs Byse et Joughin ont écrit que lorsque le professeur est protégé par les lois, un bureau sympathique est mieux armé pour résister aux clameurs d'un groupe de militants qui réclament sa tête.

Malgré tout il faut reconnaître que la plupart des professeurs préfèrent que la stabilité de leurs fonctions soit reconnue simplement comme une obligation morale dans une université connue depuis toujours pour son esprit de tolérance envers ceux des membres de son corps professoral qui prêtent le plus à controverse. A leur yeux cela serait préférable à la consécration juridique de la stabilité dans une institution dont la réputation, à cet égard, serait plus discutable. Mais le choix ici est odieux si l'on songe que l'idéal serait de consacrer la stabilité de l'emploi dans une institution qui cherche à respecter ses obligations morales.

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[7] Voir, par exemple, le rapport d'un comité d'enseignants de l'Ecole de droit, Université du Dakota-Sud, 5 *South Dakota Law Review*, p. 31 à 35 (1960).

PARTE II LES EFFETS JURIDIQUES DE LA STABILITE DE L'EMPLOI

Aux Etats-Unis et en Angleterre

Rares sont les décisions des tribunaux canadiens au sujet de la stabilité de l'emploi. Par contre, aux États-Unis, ils sont innombrables. Malheureusement, ils n'ont pour nous qu'une utilité restreinte. Etudier les affaires américaines c'est s'embourber dans un marécage de considérants purement formels, fondés dans une très large mesure sur le droit constitutionel américain, au niveau des États comme au niveau fédéral. Malheureusement aussi les décisions sont pour la plupart réactionnaires et peu propres à servir utilement la cause de la stabilité de l'emploi devant un tribunal canadien. En conséquence, je ne citerai que très brièvement et en passant l'expérience américaine à ce sujet.[8]

Aucune décision des tribunaux d'Angleterre n'a été consignée à ce sujet dans les recueils et les auteurs ont peu parlé de la question.[9]

Stabilité officieuse

Jusqu'à il y a une dizaine d'années, à une ou deux exceptions près, ni les statuts ni les réglements des universitées canadiennes ne tenaient expressément la stabilité de l'emploi comme étant le droit pour le professeur de conserver sa situation jusqu'à sa retraite. En l'absence d'un accord formel sur la question, quelle est la validité, en droit, d'un contrat d'emploi passé avec une université, du point de vue de la stabilité? On peut commencer par se demander si la charte ou les statuts de l'université lui permettent, en fait, de garantir au professeur la stabilité de son emploi, lors même qu'elle voudrait expressément le faire? La question se pose parce qu'un grand nombre des chartes des universités américaines et canadiennes contennent des expressions investissant les autorités compétentes du droit de nommer les professeurs "à loisir" ou portant que les situations ne sont conservées qu'à "la discrétion du Bureau". On a prétendu, avec succès parfois aux Etats-Unis, que ces mots *limitent* de droit qu'a le Bureau de nommer des professeurs, sinon "à loisir". Cela revient en somme à prétendre que le Bureau conserve le droit arbitraire de congédiement, sa charte ne

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[8] Voir l'analyse approfondie la plus récente de la position des Etats-Unis, symposium sur "La liberté universitaire", *Law and Contemporary Problems*, Vol 28, no 3, p. 429 à 635 (Eté 1963).

[9] Lord Chorley traite de l'état actuel de la liberté universitaire au Royaume-Uni dans le numéro précité de *Law and Contemporary Problems*, p. 647.

l'autorisant pas à y renoncer. En conséquence—c'est du moins la thèse que l'on défend—rien dans le contrat d'emploi, qu'il s'agisse d'une clause habituelle ou d'une disposition implicite, ne permet aux autorités universitaires d'abandonner leur droit de congédier à leur gré. En fait une disposition expresse à cette égard serait nulle et non avenue.

Nos recueils de jurisprudence ne font état que de six jugements rendus par des tribunaux canadiens. Dan l'ensemble ils sont peu utiles. La thèse excessivement formelle indiquée dans l'alinéa précédant n'intervient dans aucun jugement canadien. Il y a même lieu de croire que nos tribunaux n'y accorderait guère d'attention. C'est qu'en premier lieu nos tribunaux ne reconnaissent pas l'existence implicite de restrictions au droit qu'ont les personnes morales de conclure des contrats à moins que ces restrictions ne soient logiquement conformes aux objets de la société en question tels qu'ils sont exposés dans sa charte ou ses statuts. Au contraire nos tribunaux ont tendance à permettre aux sociétés l'exercice de droits découlant plus ou moins directement de la poursuite de ses objets. Il serait malaisé de prétendre qu'accorder la stabilité de l'emploi en tant que condition de travail ne découle pas, à tout le moins, de la poursuite de l'objet de l'université qui est d'aider à garantir la liberté académique. C'est particulièrement vrai dans un marché où règne la concurrence, là où cette stabilité pourrait aider à trouver les meilleurs professeurs. Il semble donc que dans la plupart des universités canadiennes il serait possible, pour peu qu'elles le désirent, d'inclure expressément dans leur contrat de travail le droit à la stabilité de l'emploi.

Le jugement le plus ancien dont fassent mention nos recueils[10] (Nouveau-Brunswick, 1861) constatait que le professeur qu'on y avait congédié *avait été*, en fait, engagé "à loisir" par Kings College. Le successeur de cette dernière institution, l'Université du Nouveau-Brunswick, n'avait pas modifié les conditions de son emploi et, en conséquence, retenait le droit de le congédier à son gré. Dans tous les autres cas dont parle la jurisprudence, le bureau compétent avait été expréssément revêtu d'attributions fort étendues. Comme il lui était loisible de retenir "à loisir" les services d'un professeur, ou de lui imposer les conditions qu'elle désirait, la question ne se posait pas. Le rapport, dans l'affaire du Nouveau-Brunswick, n'a rien à nous apprendre sur les circonstances du congédiement ni sur la nature du différend qui opposait le professeur à l'université.

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[10] Ex parte Jacob (1861) 10 N.B.R. 153.

En supposant donc qu'il n'existe rien dans la charte de l'université qui constitue un obstacle absolu à la sécurité de l'emploi, va-t-on supposer que celle-ci sera implicitement consacrée comme condition d'emploi par la coutume ou l'usage? Le deuxième cas dont fasse mention la jurisprudence et qui s'est posé à l'université Queen's peu après celui du Nouveau-Brunswick, semblait tenir que la stabilité de l'emploi pouvait effectivement être assurée de cette manière. Au début du l'affaire, à une des première audiences, le vice-chancelier Esten avait jugé que le plaignant pouvait conserver sa situation "tant qu'il se conduisait bien et s'acquittait convenablement des fonctions attachées à son emploi". Autrement dit il jouissait de la stabilité et ne pouvait être congédié que pour un motif sérieux. En l'absence de toute disposition expresse à cet égard, consacrant la stabilité de l'emploi "tant qu'il se conduisait bien", on peut supposer que le vice-cancelier invoquait la coutume. La juridiction d'appel n'en devait pas moins statuer que:

> . . . quant à la stabilité de l'emploi, la charte est muette. Nous n'avons rien trouvé qui puisse permettre de conclure que le plaignant ait été employé aux termes d'un contrat dont les stiplations iraient au-delà des dispositions habituelles, savoir que ses services avaient été retenus de la façon coutumière et qu'il pouvait y être mis fin de la même façon [c'est-à-dire sur avis raisonnable.][11]

Un autre tribuanl ontarien s'est prononcé dans le même sens en 1923 sur un problème différent. L'Université de Toronto avait mis à la retraite d'office un de ses professeurs âgé de 68 ans, contre le gré de celui-ci. Il prétendait que sa nomination avait un caractère de permanence dans le temps, c'est-à-dire qu'il était "nommé à vie, sous réserve seulement qu'il se conduirait bien et qu'il resterait apte à s'acquitter convenablement de ses fonctions". Dans ses attendus, M.le juge Orde déclairait:

> . . . [le plaignant] a cherché à démontrer l'existence d'une coutume ou d'un usage courant dans toutes les universités en général et dans celle de Toronto en particulier, soit que les nominations aux postes de professeurs sont des nominations "à vie" (. . .) J'ai jugé une telle thèse inadmissible et futile vu les dispositions expresses de la loi sur les universités qui dispose en effet que les personnes nommées par la Bureau le sont "au bon plaisir du Bureau sauf dispositions contraires". Je ne vois vraiment pas que l'on puisse prétendre que le fait que le Bureau a toujours assimilé les nominations qu'il fait à

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[11] Weir v Mathieson (1866) 3 Grant's E. & A. 123, par Hagarty, J. à 151.

des nominations à vie et que d'autres universités en ont fait autant puisse restreindre les attributions dont est investi le Bureau . . ."[12]

Bien qu'il se soit agi ici du droit du Bureau d'exiger la mise à la retraite d'office *à* tel ou tel âge, on pourrait faire valoir les mêmes arguments contre l'existence implicite du droit à la stabilité de l'emploi *jusqu'à* cet âge. Un Bureau pourrait prétendre qu'en l'absence de dispositions expresses à cet égard la stabilité de l'emploi ne saurait être tenue pour une des conditions de l'engagement.

Une affaire entendue en Saskatchewan en 1920 faisait état d'une restriction possible et implicite au droit de congédiement. Nous reviendrons plus tard sur cette déplorable affaire. Qu'il nous suffise pour l'instant de noter que, commentant le congédiement de trois professeurs, le tribunal affirmait:

> Puisqu'il n'est pas question que l'on n'ait pas respecté les règlements ou les statuts, nous ne pensons pas avoir le droit de défaire ce qui à été fait, *à moins que le président ou les gouverneurs n'aient exercé leurs pouvoirs discrétionnaires de congédiement de façon indue ou pour des motifs frauduleux ou abusifs* . . . [les italiques sont de moi][13]

Le cas le plus récent dont fasse mention la jurisprudence canadienne nous vient du Manitoba et remote à 1923. Le tribunal y a jugé qu l'emploi était valable pour un an seulement, sous réserve d'être déterminé sur avis préalable d'un an, mais que le Bureau ne pouvait résilier le contrat à moins qu'il ne fût "honnêtement persuadé que la chose fût dans le meilleur intérêt du collège".[14] Cette forme restreinte de stabilité, laissant au bureau des pouvoirs discrétionnaires fondés sur une conviction honnête, était fondée sur les circonstances particulières de l'affaire. Il y avait eu une longue correspondance entre le professeur congédié et le président du collège et c'est dans ces lettres que le tribunal avait été chercher les termes du contrat plutôt que dans la coutume et l'usage.

Même si tous les tribunaux convenaient que le Bureau n'est habilité à congédier un membre du corps professoral que dans le seul cas où il serait persuadé que ce congédiement servirait au mieux les intérêts

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[12] Craig v. Gouverneurs de l'Université de Toronto (1923) 53 O.L.R. 312, à 320.

[13] In re The University Act, In re The University of Saskatchewan and MacLaurin et al. (1920) 2 W.W.R. 823, à 824.

[14] Smith v. Wesley College (1923) 3 W.W.R. 195, à 203.

de l'université, l'effet ne serait guère considerable. Un congédiement prononcé par un bureau pour des motifs frauduleux, dans l'intention d'opprimer la victime, constitue une hypothèse trop aventurés pour être recevable. Si ridicule que puisse être un congédiement, il sera selon toute vraisemblance prononcé par un bureau animé de la plus vertueuse indignation et fermement persuadé du bien fondé de ses motifs. C'est précisément dans ces circonstances que le professeurs a besoin d'être protégé. Or c'est justement là où les tribunaux se déclarent incompétents.

Il nous semble donc illusoire d'espérer que la coutume ou l'usage puissent chez nous garantir la stabilité de l'emploi. Le recours aux tribunaux a été à cet égard inutile. Dans un seul cas—en Nouvelle-Ecosse,—celle-ci a-t-elle été reconnue par la cour. Or, ici, elle était expréssément prévu par la charte du collège.

Stabilité expressément créée

Le cas de jurisprudence de la Nouvelle-Ecosse cité ci-dessus *Re Wilson,*[15] *1885*, est intéressant à plus d'un titre, d'abord parce qu'il montre clairement que le principe de la stabilité de l'emploi du professeur était reconnu et protégé par la loi il y a plus d'un siècle. Dans la loi de la province de la Nouvelle-Ecosse qui réorganisait en 1953 le collège de Windsor, il était stipulé:

> Le président et les professeurs conserveront leur emploi *tant qu'ils se conduiront bien* [les italiques sont de moi], mais ils pourront être congédiés pour négligence dans l'exercice de leurs fonctions, inefficacité ou autre motif sérieux, si neuf membres du bureau votent ce congédiement.[16]

Sans doute l'expression "ou un autre motif sérieux" est-elle vague, mais il serait difficile de trouver des motifs de congédiement qui soient exprimés autrement que d'une façon générale. Il importe d'ailleurs au plus haut point d'imposer certaines réserves à la stabilité de l'emploi qui, même chez les magistrats, n'est pas entière. C'est que la stabilité de l'emploi n'est pas une fin en soi; elle a pour objet d'assurer que le titulaire de ces fonctions soit apte à s'en acquitter au meilleur de sa capacité, pour le bien public. Sans doute existera-t-il toujours des possibilités de divergence de vues entre gens raissonables. Il sera parfois difficile de déterminer si celui à qui est garantie la stabilité de l'emploi est sorti des limites dans lesquelles il était protégé. Les motifs

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[15] Re Wilson (1885) 18 N.S.R. 180.
[16] *Ibid.*, 196.

de congédiement d'un professeur dont l'emploi était assuré, même si toutes les institutions employaient le même vocabulaire, n'auraient sans doute pas le même sens partout. On songe tout de suite à la distinction entre les institutions religieuses et les institutions non-confessionelles. Il serait peut-être tout à fait raisonnable d'attendre d'une université catholique ou méthodiste qu'elle exige de ses professeurs qu'ils ne prêchent pas une autre foi à leurs étudiants contrairement aux objets avoués de la charte de l'institution[17]. D'autre part les mêmes opinions prêchées dans une autre université ne soulèveraient peut-être aucune difficulté et ne constitueraient pas un motif sérieux de congédiement.

Parmi les motifs classiques de congédiement qui figurent aux réglements américains relatifs à la stabilité de l'emploi—reproduits d'ailleurs récemment dans notre pays—on trouve "l'inefficacité (ce qui est sans doute synonyme d'incompétence), la négligence dans l'exercice des fonctions, l'inconduite grave ou la turpitude morale et les difficultés financières graves dans lesquelles se trouverait l'université." La question de la compétence ou de la négligence peut présenter de réelles difficultés, les normes exigées variant selon l'âge, les titres et qualités, l'expérience et le grade du professeur, les obligations qu'il a volontairement assumées et les normes valables à l'intérieur de l'institution elle-même. Il est difficile de développer davantage ce point de vue. Qu'il suffise de dire ici que c'est surtout au moment de l'engagement du professeur qu'il convient d'insister là-dessus avant de lui garantir la stabilité dans son emploi. Il n'est pas douteux qu'un professeur qui devient ultérieurement indolent et se désintéresse de son travail doit s'exposer au congédiement. Ce motif a rarement été invoqué dans des causes de ce genre aux Etats-Unis et il n'en est question dans aucun jugement canadien.

Le dernier motif—celui des difficultés financières—a encore moins d'importance et ne serait invoqué qu'en cas de fermeture d'un département, d'une faculté ou d'une institution tout entière. Si cette éventualité fort incertaine allait se réaliser chez nous, le plus que le professeur pourrait attendre serait une compensation pécunaire quelconque ou un pré-avis suffisant.

La plus fréquente et la plus ennuyeuse des raisons invoquées pour le congédiement intéresse l'inconduite grave ou la turpitude morale.

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[17] Tout en concédant que cette exigence est raisonnable, nous croyons qu'une institution confessionnelle devrait néanmoins en fixer expressément les limites; autrement, on est en droit de s'attendre qu'une institution qui s'attribue le titre d'université accorde pleine liberté d'expression aux membres de la faculté.

Il y a lieu de distinguer ici deux aspects. Le premier suppose une inconduite personnelle allant parfois jusqu'à une infraction au code pénal. En supposant qu'un professeur ait été jusqu'au crime: meurtre, vol ou détournement de fonds, on n'aura pas à chercher le motif très loin. Mais des cas plus compliqués peuvent se poser. Supposons le cas, par exemple, d'un professeur marié qui a eu une liaison avec une étudiante, comme on l'a supposé dans l'affaire *Orr*[18], ou celui d'un autre professeur qui passe ses étés à imprimer des pamphlets fascistes, ou qui professe, dans ses cours de mathématiques, l'amour libre ou le renversement par la force du gouvernement canadien? Dans quelques institutions, le climat général est tel que cette conduite constitue un motif suffisant de congédiement, alors qu'ailleurs certaines de ces activités seulement—ou aucune—seraient jugées suffisantes. Si fréquents qu'aient pu être les cas de ce genre, la question d'un congédiement ultérieur ne s'est à peu près jamais posée.

Le second aspect de l'inconduite grave ou turpitude morale n'a à peu près rien à voir avec les mots eux-mêmes. Il s'agit ici de la loyauté envers l'institution, ou plutôt envers les hommes qui y sont revêtus de l'autorité, notamment le président. Dans les six causes dont fait mention notre jurisprudence, quatre étaient fondées sur le défaut de loyauté des professeurs en question. Leurs critiques étaient à l'origine de la perte de leur situation. Le pire exemple est celui tiré de l'affaire évoquée en Saskatchewan et dont il a été question plus haut. Les trois professeurs remerciés l'avait été pour avoir "manifesté un esprit d'obstination à l'endroit du bureau et un manque de respect pour son autorité". Plus grave encore, ils avaient manqué de loyauté envers le président, loyauté que, selon le tribunal, le corps professoral tout entier était tenu d'avoir.

> Il est difficile de comprendre comment celui qui est loyal envers le président de sa propre institution peut lui faire défaut en cas de besoin ou hésiter à manifester sa loyauté *à son chef* si elle existe vraiment [les italiques sont de moi] . . .[19]

L'idée que le président d'une université peut être le chef du professeur est assez étonnante, c'est le moins qu'on puisse dire. Elle supposerait une hiérarchie dans le commandement analogue à celle qui existe dans l'armée, mais peu concevable dans une communauté de savants.

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[18] Pour une analyse de la cause *Orr,* Voir: *Bulletin de l'A.C.P.U.,* Vol 11. no 3, p. 29 - Décembre 1962.

[19] In re The University Act [1920] 2 W.W.R. 823, à 829.

En l'espèce, le directeur des services *d'extension* avait accusé le président d'inconduite grave dans la gestion des affaires financière de l'université. Les trois professeurs avaient jugé ces accusations suffisamment fondées pour justifier une véritable enquête. Parlant de leur point de vue à cet égard, le tribunal déclarait:

> (. . .) les attendus écrits signés par les trois professeurs revenaient à prétendre que les accusations de X. . [le directeur en question] justifiaient une enquête. Nous estimons que le fait de n'avoir pas voté la confiance au président, en ce qui concerne sa gestion des affaires de l'université, le fait de ne lui pas avoir manifesté leur loyauté, à la lumière des attendus dont nous avons été appelés à connaître constituent [une acceptation des accusations lancées contre le président] (. . .) et qu'en conséquence il y avait lieu pour l'université de se dispenser de leurs services au cas où ces accusations se trouveraient sans fondement . . .[20]

Le tribunal ne dit pas pourquoi il faudrait congédier ces professeurs de sorte que nous devons en conclure que c'était à cause du défaut de loyauté. Le vote en question posait la question en termes parfaitement clairs. Il fallait se prononcer pour le président ou être mis à la porte.

Cette affaire représente l'essentiel même de la question de la stabilité de l'emploi au Canada. Il est douteux que, dans notre climat politique actuel, un professeur d'université puisse être congédié pour avoir exprimer des opinions relatives à la politique en général. Malheureusement les Etats-Unis ont tout récemment eu à déplorer des atteintes graves à la liberté académique. Il n'est pas dit que nous soyons parfaitement à l'abri de ce risque. Néanmoins c'est la politique universitaire plutôt que le politique en général qui, dans le passé, a constitué le terrain le plus dangereux à cet égard. Il est probable que cet état de choses va se perpétuer. Le professeur qui consacre la meilleure partie de sa vie à l'enseignement dans une université finit par se trouver intimement mêlé à sa vie administrative et intéressé à son avenir. Critiquer les programmes adoptés ou les personnes qui les formulent, si amèrement que cela puisse se faire, doit rester le droit strict de celui qui est si étroitement attaché à l'institution en question. En pourtant, dans quatre des cas cités, c'est l'exercice de ce droit qui était à l'origine du congédiement.

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[20] *Ibid.*

Il y a d'ailleurs lieu de distinguer la loyauté envers l'institution de la loyauté envers ceux qui sont provisoirement chargés de l'administrer. Il est douteux que la loyauté envers l'institution doive entrer le moins de monde en ligne de compte lorsqu'il s'agit de la stabilite de l'emploi. *A fortiori* ne doit-on pas exiger la loyauté envers ses dirigeants. Il devrait être précisé que les mots "inconduite grave" ou "turpitude morale" ne doivent, en aucune manière, être synonymes de déloyauté envers l'administration ou le bureau de l'université. En fait la question de la loyauté n'a aucune importance tant que le professeur s'acquitte convenablement de ses fonctions. Il va de soi qu'un professeur sérieux ne doit pas lancer de critiques à tort et à travers, en public ou en particulier, mais ne doit-on pas reconnaître que ce manque de jugement et de discrétion est plus de nature à nuire à celui qui en est coupable qu'à ceux qu'il critique. Les autorités de l'université devraient se contenter des mêmes remèdes que les autres citoyens, soit les lois relatives à la diffamation. On doit noter ici que si les membres du corps professoral participaient entièrement à l'administration de l'université les découragements qui sont si souvent à l'origine des critiques irréfléchies s'en trouveraient diminués dans une très large mesure.

Recours contre les congédiements non motivés

Dans l'affaire *Wilson*[21], le tribunal avait jugé que ce professeur avait été indûment congédié. Quelle compensation convenait-il de lui accorder pour le tort subi par lui? Dans notre système juridique cette compensation revêt généralement la forme de dommages-intérêts versés en espèces. Mais cela n'est pas toujours suffisant. Le professeur congédié se préoccupe davantage de défaire le mal qui a été fait que de recevoir une somme d'argent. Il préfére être réintégré dans ses fonctions et toucher son juste traitement.

D'habitude lorsqu'une personne est indûment privée de sa situation de fonctionnaire, qu'il s'agisse d'un secrétaire de munipalité par exemple, le tribunal n'hésite pas à prononcer la réintégration. En l'espèce le tribunal estimerait nul et non avenu son congédiement en invoquant l'abus de pouvoir des autorités. Il suffit donc qu'il statue que le secrétaire en question n'a pas été congédié et qu'il reste en fonction. Il conserve donc et sa situation et son traitement. La même observation vaut pour le professeur d'une université publique.

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[21] Re Wilson, renvoi 15, *supra*.

Par ailleurs, dans une université privée, le problème est assez différent. Le droit du professeur à sa situation est fondé, non sur certains status ou règlements, mais sur son contrat de service. Normalement le tribunal n'exigera pas l'*exécution littérale* du dit contrat, en l'occurrence, la réintégration. Dans bien des circonstances cette décision n'est pas dépourvue de sens, une ordonnance d'exécution de ce genre étant sanctionnée par une menace d'emprisonnement au cas où le défendeur refuserait d'obtempérer. Ordonner l'exécution personnelle d'un contrat reviendrait à consacrer la servitude, en obligeant par exemple quelqu'un à rester au travail six mois, conformément aux termes de son engagement, sous peine de prison. Dans ces cas-là, le tribunal estime que même si le plaignant a été lésé par le refus immotivé du défendeur de se conformer à ses obligations, il doit se contenter de dommages-intérêts. On a parfois même prétendu que cette règle s'applique également aux deux parties, en ce sens que si on ne peut pas obliger l'employé à travailler pour son employeur, l'inverse reste vrai. Il a été possible à certaines universités américaines de faire valoir cette thèse avec quelque succès. La question s'est aussi posée dans l'affaire *Wilson*. La thèse peut se défendre là où les rapports ont un caractère personnel, tels ceux qui lient le maître à l'apprenti, mais elle est dépourvue de validité dans une grande institution comme une université. Aucun principe juridique n'exige que les recours soient toujours mutuels. On trouvera dans la loi un grand nombre d'exemples du contraire. Il est très raisonnable de ne pas obliger un homme à travailler pour une personne morale et de n'exiger de lui que des dommanges-intérêts alors qu'au contraire on peut exiger de l'institution qu'elle le réintègre au cas où il aurait été congédié sans motif. C'est ainsi qu'en a décidé la tribunal dans l'affaire *Wilson*:

> On a aussi prétendu que le plaignant [Wilson] disposait d'un autre recours, qu'il pouvait se pourvoir en dommages-intérêts du fait de son congédiement indu. Mais une compensation de ce genre ne semble pas avoir été jugée tellement suffisante, sûre et précise qu'elle ait pu engager le tribunal dans les cas que j'ai cités . . .[22]

En conséquence le tribunal a prononcé la réintégration du professeur Wilson.

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[22] *Ibid.*, 200-1.

On pourra prétendre que le collège de Windsor était une institution publique et que l'affaire ne fait pas jurisprudence en ce qui concerne les institutions privées. Pourtant, à l'époque actuelle, tous les collèges ou universités sont plus publics que ne l'était le collège de Windsor. Ils sont presque tous constitués en corporation aux termes d'une loi, comme l'était ce collège, ou ont reçu une charte de la Couronne. Tous, en outre, touchent d'importantes subventions du trésor public. Il est douteux qu'une université canadienne quelconque puisse continuer d'exister pendant un seul semestre sans les grandes subventions fédérales et provinciales dont elle bénéficie. A tout événement, dans l'affaire *Wilson* le tribunal n'a pas fondé son jugement sur le fait que les fonctions du professeur avaient un caractère public, mais sur la stabilité d'emploi dont il était assuré. Il s'est contenté de déclarer que puisqu'il avait été congédie sans motif sérieux il y aurait lieu de prononcer la réintégration, une indemnisation en argent ne paraissant pas suffisante dans les circonstances. La chose peut paraître un peu douteuse, mais je crois pour ma part qu'un professeur canadien à qui la stabilité de l'emploi a été expressément consentie et qui est congédié sans motif, que l'institution en cause soit publique ou privée, peut bénéficier d'une ordonnance de réintégration.

Sommaire

La "stabilité officieue", autrement dit, celle que consacrent la coutume et l'usage, n'a pas été reconnue par nos tribunaux et il est douteux qu'elle le soit jamais. On doit en conclure que les professeurs qui enseignent sans que la stabilité de leur emploi soit formellement reconnue par le contrat de service ne bénéficient vraisemblablement d'aucun recours au regard de la loi. Il est loisible de les congédier à n'importe quel moment en leur donnant un avis raisonnable ou, à défaut, une indemnité en argent. Le délai maximum exigé par les tribunaux serait vraisemblablement une année universitaire complète pour les plus anciens professeurs et une période moindre pour les moins anciens. Autrement dit la "stabilité" en ce qui concerne les professeurs de la plupart des universités canadiennes correspond en gros à l'avis que toute personne touchant un traitement annuel d'une grande entreprise a le droit de recevoir.

On ne saurait toutefois prétendre, de façon générale, que les tribunaux canadiens s'arrêteraient sérieusement à la thèse selon laquelle la charte d'une institution lui interdirait de garantir la stabilité de l'emploi de façon expresse. Mais même ici il n'existe aucune règle

générale. Chaque charte constitue un cas d'espèce, mais les tribunaux ne favorisent pas un point de vue restrictif. Une fois la stabilité accordée, si le professeur est illégalement congédié, il a de bonnes chances d'être réintégré sur l'ordre du tribunal.

Dans l'ensemble, l'historie de la protection des droits juridiques dans notre pays n'est pas heureuse. Si nous ne pouvions pas aller au-dèla, toute la question de la liberté universitaire au Canada se poserait en termes aigus. Fort heureusement nous pouvons regarder plus loin. Dans la plupart des universités la nomination à une situation permanente est tenue à la fois par le corps enseignant et par l'administration comme propre à assurer une sécurité qui n'est pas inscrite dans la loi. Il en va ici cependant comme de la participation du professeur à l'administration elle-même. Autrement dit ce n'est pas parce que nous avons pu jusqu'ici nous tirer d'affaires sans crise grave que nous pouvons juger la situation parfaitement satisfaisante, bien au contraire. Les incidents qui ont pu se produire jusqu'ici ont presque invariablement tourné au désavantage du professeur en cause. Comme l'ont affirmé les professeurs Byse et Joughin il suffit de quelques cas de répression pour empoisonner l'atmosphère universitaire et étouffer la liberté. Les dangers inhérents à la situation actuelle, eu égard notamment à l'état de dépendance de plus en plus étroite dans laquelle se trouvent les universités vis-à-vis les subventions de l'Etat et à la tentation de plus en plus forte que doit éprouver celui-ce de mêler à la vie et à l'administration universitaires justifie les quelques projets de réforme exposés dans la suite de la présente communication et qui, autrement, pourraient sembler pure présomption.

PARTIE III CREATION DE LA STABILITE DE L'EMPLOI

Les jugements de valeurs sur les délais à prescrire en ce qui concerne la titularisation débordent le cadre du présent article. Les opinions à ce sujet varient énormément. Faut-il exiger un postulat de trois, cinq ou sept ans? On n'est pas moins indécis en ce qui concerne la nature même du délai de titularisation. Faut-il compter à partir du grade atteint au moment de l'engagement ou à partir de celui où l'avancement intervient pendant le postulat? J'ai déjà exprimé mon avis sur l'intérêt que présente un acte formel de titularisation, opposé à un simple acquiescement au rengagement du professeur.

Il reste à discuter deux autres aspects de la création de la stabilité de l'emploi. On doit déterminer, en premier lieu, qui doit prendre les

décisions à cet égard. Le professeur à qui est assurée la permanence de sa situation au sein du corps professoral se trouve par le fait même à épouser, de façon non moins permanente, les intérêts de l'université. En conséquence ce ne doit pas être à une simple commission administrative à se prononcer sur sa titularisation. Une telle commission doit grouper principalement les autres membres de son département, déjà titularisés ou, si celui-ci est relativement petit, des professeurs titularisés de la même faculté.

Deuxièmement, où doit-on trouver les règlements relatifs à la stabilité de l'emploi? Il y a à cela trois réponses possibles. a) Les règlements devraient être exposés par le menu dans les conditons du premier contrat de service, bien que les dispositions qu'on y trouve pourront varier du point de vue du traitement ou de la longueur du postulat exigé d'un professeur, en fonction du grade qu'il a atteint au moment de son engagement. Ce contrat régirait ses rapports avec l'université tant pendant le stage du postulat qu'après qu'il aura bénéficié de la titularisation. b) Les associations de professeurs de faculté sur place pourront négocier avec la direction de l'université la conclusion d'un accord uniforme intéressant les conditions de travail et la stabilité de l'emploi. Un accord de ce genre, comme les contrats collectifs qui interviennent chez nous dans l'industrie, serait porté à la connaissance du professeur et s'appliquerait à partir du moment précis de son engagement. Les seules variantes permises auraient pour objet d'assurer des avantages supplémentaires au professeur engagé. Il ne saurait jamais être question de restreindre les droits exposés dans le contrat collectif. c) A l'issue de consultations appropriées avec le personnel, une université pourrait chercher à faire modifier sa charte ou ses status ou, aux termes de ceux-ci, adopter une série de mesures variées où figureraient des règlements précis relatifs aux conditions de travail et à la stabilité de l'emploi. Ajoutons que ces règlements s'appliqueraient *ipso facto* à chaque nouveau professeur, sous réserve seulement des avantages supplémentaires qu'il pourrait chercher à obtenir par la négociation, comme condition de son entrée au corps professoral.

Bien que la méthode a) ait l'avantage de la simplicité, elle présente l'inconvénient d'échapper à tout contrôle ou à toute forme d'inscription publique. Avec le temps, elle risquerait de s'altérer sous l'effet de pressions diverses ou de changement dans le personnel administratif. D'autre part, même si la méthode b) résout cette difficulté elle est analogue dans son fonctionnement aux contrats que interviennent dans l'industrie et risque, de ce fait, de susciter les

objections d'un grand nombre de professeurs ou d'institutions pour la raison qu'elle ne semble guère conforme aux nécessités de la commanauté universitaire. Personnellement je préfère la méthode c). On a donné à entendre qu'à toutes fins pratiques elle consacreraiet le *statut* du professeur, en ce sens que par la simple acceptation d'un poste d'enseignement ou de recherche celui-ci se trouverait revêtu des droits et devoirs inscrits dans les règlements de l'université. Mais il importe peu, au fond, que le professeur juge qu'il ait acquis ses droits aux termes d'un statut ou simplement en devenant partie à un contrat. Le résultat est à peu près le même dans les deux cas.

Que doivent être en substance ces règlements? On devrait y trouver un premier lieu une déclaration détaillée au sujet de la longueur du postulat et des modalités de titularisation. On devrait notamment y trouver des considérations, par exemple, sur l'examen d'office par la commission de sa demande à la fin du son stage ou, au contraire, sur l'obligation qui lui incomberait de la présenter de lui-même. On devrait aussi y faire état de l'avis que doit donner le professeur qui désire quitter l'université, soit pendant son postulat, soit postérieurement à sa titularisation. On devrait aussi, en troisième lieu, mentionner les règles relatives, mettons, au congé *sabbatique,* aux congés, aux recherches ou publications personnelles et à l'utilisation à ces fins des facilités mises à la disposition du professeur par l'université. Quatrièmement il devrait y être question des droits et devoirs tant du professeur en titre que de l'université. Ceux-ci devraient être aussi clairement et complètement exposés que possible, bien que l'on prendra soin de ne pas consacrer ainsi un système par trop rigide. Plus particulièrement on s'attachera à y décrire d'une façon aussi précise que possible les motifs que pourra éventuellement invoquer l'université qui désire congédier un de ses professeurs titularisés. Il a déjà été fait mention de certaines des difficultés qui risquent de se poser à cet égard. On ne saurait prétendre, en effet, qu'il soit facile de codifier ces motifs de congédiement. Les règlements doivent aussi exposer d'une façon aussi complète que détaillée les modalités de congédiement au cas où la direction de l'université aurait décidé d'en user ainsi à l'endroit d'un de ses professeurs en titre. Ce dernier aspect de la question me préoccupe d'une façon toute particulière. Je suis persuadé que les modalités de congédiement *doivent obligatoirement* être expliquées par le menu. La partie suivante de la présente communication ne traite pas d'autre chose. Il suffira, je pense, de la lire attentivement pour en comprende l'importance.

PARTIE IV MODALITES DE GARANTIE DE LA STABILITE

Une fois que l'administration universitaire a décidé de remercier un de ses professeurs un problème grave se pose: la carrière de celui-ci risque de s'en trouver compromise. Cela étant, il a le droit de compter sur la protection des lois. Mais cette protection n'a de sens que dans la mesure où elle sera d'avance inscrite dans les procédures d'appel dont il pourra se pourvoir. Ainsi, par exemple, se contenter de dire qu'il ne peut être congédié sans motif sérieux n'a qu'une valeur bien relative si l'autorité compétente à se prononcer sur le sérieux du motif jouit à cet égard d'un pouvoir absolument discrétionnaire. Une fois ce pouvoir exercé au préjudice du professeur les tribunaux risquent d'être désarmés. Une procédure aussi inéquitable vaut en vérité encore moins que l'absence totale de procédure. Si la stabilité est garantie sans modalités précises à cet égard, ce sera au tribunal lui-même à les fixer et le congédiement sera jugé inacceptable si on ne s'est pas conformé aux normes arrêtées par lui. D'autre part si la procédure est bonne et qu'elle est respectée, le tribunal ne sera pas appelé à intervenir. Celui-ci ne saurait substituer son opinion à celle d'une instance régulièrement constituée et fonctionnant convenablement au sein même de l'université. Dans la plupart des cas les deux parties accepteront plus volontiers ses décisions.

L'aspect essentiel d'une procédure de congédiement est l'audition de la cause. On peut dire, pour la caractériser de la façon la plus simple possible, qu'elle doit être *juste*. Il faut pour cela que se trouvent réunies un certain nombre de conditions profondément enracinées dans l'évolution de notre système juridique et nos traditions. Il y a à cela de bonnes raisons. Comme on l'a affirmé dans l'affaire *Wilson,* la jurisprudence anglaise, assez abondante, dont on avait fait état dans les attendus de jugement, prévoyait qu'avant qu'on puisse priver qui que ce soit de ses biens ou d'une situation qui lui a été garantie—l'intéressé avait le droit de se faire entendre. Le tribunal, dans l'affaire en question, avait motivé son jugement par le fait que cela ne s'était pas produit. Dans ses attendus, il n'a pas voulu connaître de l'inconduite présumée de professeur Wilson qui avait été à l'origine de son congédiement par le bureau, mais s'est contenté de prononcer sa réintégration pour le motif qu'il n'avait pas eu l'occasion de se défendre convenablement.

Une très longue tradition jurisprudentielle anglo-américaine a consacré les principes qui doivent être respectés avant que l'on puisse affirmer que la victime ait effectivement eu toute liberté de se défendre.

J'ai simplement cherché à les adapter à nos besoins en me fondant pour cela sur le meilleur modèle existant, soit le code de procédure proposé par l'*American Association of University Professors*. Essentiellement mes commentaires sont conformes à la procédure envisagée par elle. J'ai simplement modifié quelque peu le vocabulaire ou insisté sur certains aspects de la question qui prennent, au Canada, une importance toute particulière.

L'audition de la cause

Quand peut-on affirmer que l'on a donné à la personne lésée le droit d'exposer légitimement son point de vue? On peut distinguer ici huit conditions essentielles. Je réserverai pour l'instant l'examen de la plus importance (qui doit entendre la cause?) jusqu'à la conclusion de la présente partie. En effet c'est à la lumière des autres caractéristiques qu'il vaut mieux en traiter.

1. *Avis à donner des accusations contre le professeur: lieu et heure de l'audience*. Ces renseignements sont de toute évidence nécessaires, mais on n'est pas entièrement d'accord sur la précision à donner au chapitre des accusations ni sur le temps que l'on doit accorder au professeur pour préparer sa défense. Les accusations et les éléments de preuve sur lesquels elles se fondent doivent être assez clairement précisés pour que le professeur puisse à son tour réunir des preuves contraires. On devrait lui accorder à cet égard au moins deux semaines. Il s'ensuit que ceux qui formulent ces accusations doivent obligatoirement, à l'audience, s'en tenir aux témoignages et aux motifs de congédiement déjà indiqués sans avoir le droit d'en ajouter. Jusqu'à ce que la preuve ait été faite, il sera interdit de congédier ou de suspendre le professeur à moins que la nature des accusations soit telle qu'il ne puisse, sans danger pour lui-même ou pour les autres, continuer à s'acquitter de ses fonctions. A tout événement il doit conserver le droit à son traitement jusqu'à ce qu'on ait établi la preuve des accusations.

2. *Droit de comparaître à l'audience et de faire face à ses accusateurs*. Une audition à laquelle ne paraît pas l'accusé n'est pas une audience, mais une enquête. De même une accusation formulée en l'absence de l'accusateur (ou celui-ci n'étant pas connu comme tel) n'est pas une accusation, mais une rumeur. La personne qui est assez sûre d'elle-même pour porter contre un professeur des accusations propres à le faire congédier doit être en mesure de les répéter elle-même à l'audience, à moins d'impossibilité matérielle. De toute manière son nom doit figurer

à l'acte d'accusation produit à l'audience. Taire le nom du plaignant pour éviter de le mettre dans une situation gênante ou difficile est completement inadmissible lorsque la carrière et le gagne-pain du professeur sont en cause. Sans doute arrive-t-il fatalement que l'accusateur veuille rester dans l'ombre en chargeant les autres de l'odieux de l'affaire, mais il n'est pas impossible que les accusations paraissent sous un éclairage nouveau dès qu'on connaît celui qui les porte. Savoir que l'on aura personnellement à les répéter à l'audience fera hésiter l'accusateur et l'engagera à se montrer plus circonspect. Ajoutons qu'il est plus malaisé de réfuter des accusations dont on ignore la source.

3. *Droit à un avocat.* On prétend parfois qu'admettre des avocats a l'audience c'est risquer de voir celle-ci dégénérer en des débats de pure forme propres à faire oublier le caractère véritable de la cause. Même si ce danger était réel cependant il serait difficile et injuste d'exiger du professeur qu'il dirige seul sa défense. Il est personnellement trop engagé, émotivement et autrement, pour s'acquitter comme il faudrait de cette besogne. Les traits de caractére qui étaient à l'origine des accusations pourraient lui coûter la sympathie de la commission. Il y a lieu d'aborder la question d'une façon plus sereine. Dans certaines universités américaines le conseil dont on se pourvoit ne doit jamais être un juriste. Sans doute cela vaut-il mieux que de refuser les services d'un défenseur, mais il reste que l'on semble s'arrêter ici au bord de la justice parfaite. Les bons avocats n'ont-ils pas l'habitude de s'en tenir aux faits de la cause et de protester lorsque l'on cherche à y introduire des éléments étrangers dans le seul dessein de porter préjudice au professeur accusé?

Si l'on écarte les juristes, le professeur aura peut-être du mal à se trouver une défenseur convenable. Une personne absolument étrangère à l'université et dépourvue de formation juridique ne comprendrait sans doute pas entièrement les questions en litige. Elle ne serait guère préparée à résoudre tous les problèmes particuliers à la situation. Un de ses collègues du corps professoral hésiterait peut-être à le défendre songeant aux dangers que cela présenterait peut-être pour son avenir à l'université. Mais les avocats ont l'habitude de défendre des causes impopulaires. Quoi qu'il en soit le professeur dont la carrière est en péril doit avoir le droit de choisir le meilleur défenseur possible.

4. *Droit au contre-interrogatoire.* Ce droit est étroitement lié au droit de faire face à son accusateur et à celui de se munir d'un défenseur. L'interrogatoire des témoins de la partie adverse, notamment de

la personne qui porte les accusations, donne l'occasion d'exposer les contradictions et de jeter la lumière sur des faits nouveaux propres à éclairer autrement et sous un jour plus favorable la conduite du professeur. Le témoin le plus sincère pourrait inconsciemment dissimuler des parties de son témoignage de manière à en atténuer les effets. Un juriste impartial, peut-être habitué par sa carrière à déceler le défaut d'objectivité ou le dissimulation d'une partie de la vérité pourra plus probablement résussir là où échouerait un professeur en proie à l'anxiété.

5. *Jugement écrit avec exposé des attendus.* Dans le cas d'une décision favorable au professeur il y aura peut-être intérêt pour lui à obtenir par écrit une déclaration constantant que les accusations lancées contre lui étaient sans fondement, faute de quoi on pourrait croire qu'il a simplement été pardonné. S'il est trouvé coupable, mais que la commission décide qu'il n'y a pas de quoi lui faire perdre son emploi, ce jugement devrait aussi être publié afin de préciser les limites entre ce qui est permis et ce qui est défendu.

Et surtout, si un professeur est trouvé coupable et s'il est congédié, il a le droit de savoir pourquoi; les motifs pourront différer quelque peu de ceux que mentionne l'accusation. Les raisons invoquées par la commission pourront avoir une importance décisive si le professeur se cherche un emploi ailleurs. Une cause particulière de renvoi, qui peut être valable, mettons, dans une institution confessionnelle où l'adhésion à certains dogmes est de rigueur, peut perde à peu près toute signification dans le cas d'une autre institution. Un renvoi dont les causes ne sont pas révélées peut faire naître les pires soupçons chez des employeurs éventuels sur le compte du professeur congédié. Et lorsque les motifs invoqués mettent gravement en doute sa compétence ou ses aptitudes, le professeur n'a que ce qui'l mérite; si un employeur s'informe auprés de l'institution, il est préférable qu'elle soit en mesure de le renseigner. Enfin, s'il existe une procédure d'appel, il est essentiel que les conclusions et que les motifs sur lesquels s'appuie la décision soient connus, de façon que les deux parties puissent les contester.

6. *Droit du professeur à un appel.* Il est toujour à craindre qu'une atmosphère tendue et pénible règne à l'audience; le jugement de la commission et les procédures peuvent en être faussés. En conséquence, la cause peut être entendue sans que les droits de l'accusé soient dûment respectés ou la commission peut attribuer aux motifs de renvoi une gravité qu'ils n'ont pas. Un sobre exposé des faits, au moment de l'appel, peut rétablir le différend dans sa juste perspective et limiter le

débat aux points véritablement en litige. Pour que cet appel soit efficace, il doit porter uniquement sur le dossier, c'est-à-dire sur les accusations, sur la réplique du professeur, sur les témoignages recueillis, sur l'exposé de la preuve et sur les raisons qui ont motivé la décision de la commission d'audience. En conséquence, en matière d'appel, un septième élément, le compte rendu complet de l'instruction, est nécessaire.

7. *Droit à une transcription complète.* L'université devrait fournir un compte rendu sténographique complet de l'audience et le mettre à la disposition du professeur au moment où la commission rend sa décision. La professeur doit être libre de l'apporter avec lui et de l'étudier mais il peut être tout à fait juste d'exiger de lui qu'il n'en révèle le contenu à personne, sauf à son avocat, jusqu'à ce que l'appel soit entendu.

La question du secret est important mais il est difficile d'en définir les principes généraux. Dans la plupart des cas, il est sans doute approprié que la cause soit entendue privément. Les parties, leurs avocats et leurs témoins devraient être seuls autorisés à assister à l'audience, sauf en cas d'entente entre les intéressés et la commision. Si, après que le question a été définitivement tranchée, le professeur est exonéré, toutes les parties devraient être tenues au secret. Si, cependant, le professeur est congédié, il devrait avoir le droit, dans la mesure où cela peut l'aider, d'utiliser, à la recherche d'un nouvel emploi, et le compte rendu de l'instruction et l'exposé des motifs de son renvoi. Puisqu'on peut supposer que ces procédures ont été pour lui un gage de justice, if serait raisonnable d'obliger le professeur au silence vis-à-vis des journaux et des autres moyens d'information. Le professeur a eu l'occasion de se disculper; traîner par la suite le litige devant le public ne peut que lui nuire, à lui et à l'institution.

8. *Composition de la commission d'audience.* Un principe fondamental du droit veut qu'on ne soit pas juge dans sa propre cause. Si un juge est partie à un différend, il est forcément inapte à juger parce qu'il ne peut pas rendre une décision objective. Dans la plupart des cas, les accusations qui peuvent aboutir à un congédiement sont portées par le président, appuyé d'habitude par le Bureau des gouverneurs. Si la commission se compose, ne fût-ce qu'en partie, des doyens ou de membres du Bureau des gouverneurs, la procédure minutieuse définie ci-dessus n'a plus de sens. En dépit de toutes les autres sauvegardes que peut assurer la procédure, si ces personnes sont constituées en tribunal, autant vaut dire que l'employeur ne siège que pour entendre un appel à la clémence de la part d'un subordonné.

La commission d'audience devrait se composer des pairs de l'accusé, c'est-à-dire de professeurs titularisés, choisis sur place par l'Association de la faculté. C'est à chaque institution qu'il appartient de décider s'il y a lieu de constituer un organisme permanent ou spécial et qui doit en faire partie. La principe directeur doit être qu'aucun membre de l'administration ou de la direction de l'université ne doit y être désigné. Malheureusement, comme nous le verrons quand nous examinerons les règlements de plusieurs de nos universités en matière de stabilité de l'emploi, aucune institution jusqu'ici n'a respecté ce principe.

Pour ce qui est de la composition de la commission d'appel, certains doutes se font jour. On peut invoquer de solides arguments pour démontrer que la décision finale doit en somme relever des gouverneurs puisque ce sont eux qui, en définitive, doivent en assumer la responsabilité, Même si l'on suppose que le professeur n'entend pas interjeter appel, une décision de congédiement de la part de la commission d'audience exige quand même l'approbation officielle du Bureau. Donc, affirme-t-on, c'est le Bureau lui-même ou un comité du Bureau qui doit avoir le dernier mot. Incontestablement, il serait plus équitable que l'appel soit entendu par un arbitre choisi hors de l'université mais il n'est probablement pas logique de s'attendre que l'une ou l'autre de nos institutions puisse renoncer au droit qu'a le Bureau de rendre la décision finale. Donc, pour aboutir à un verdict impartial, il est d'autant plus important que la faculté soit dûment représentée au sein du Bureau.

Même en l'absence d'un accommodement aussi judicieux que celui-là, cependant, si l'audition initiale de la cause s'est faite en conformité des règles que nous venons de proposer et si l'appel s'appuie rigoureusement sur le dossier, le Bureau sera immunisé contre l'influence des administrateurs de qui la plainte émane, pourvu évidemment qu'ils observent l'esprit des procédures et qu'ils ne cherchent pas privément l'oreille des gouverneurs. Dans ces conditions, le professeur sera raisonnablement protégé au moment de l'appel. La commission d'appel ne devrait renverser la décision que si l'audience a été irrégulièurement menée, si les accusations n'ont pas été prouvées ou si la commission d'audience n'a pas compris les motifs du renvoi.

Médiation officieuse

Après ce long résumé des sauvegardes qu'assure la procédure, on dira peut-être que, dans ces conditions, l'audience peut être assimilée à un véritable cause criminelle. C'est vrai, et la raison en est simple: renvoyer pour cause un professeur titularisé est aussi grave pour lui

qu'une condamnation pour crime. En toute probabilité, sa carrière professionnelle en sera ruinée et il lui sera sans doute difficile de se caser dans une autre discipline. C'est pourquoi, il importe de lui fournir toutes les occasions raisonnables de répondre aux accusations portées contre lui et de se disculper.

Si nous pouvons supposer que personne n'est en faveur d'une audience aussi désagréable et aussi lourde de conséquences, il faut chercher à en éviter la nécessité quand c'est possible. A cette fin, il importe d'insister sur l'établissement de procédures préliminaires en vue d'une médiation ou d'un règlement officieux. Soit avant que des accusations officielles aient été portées contre un professeur, soit au plus tard après qu'elles lui ont été communiquées mais avant qu'une instruction soit ouverte, une réunion entre le professeur et un des membres principaux de l'administration devrait être de rigeur. Un professeur non intéressé au différend, choisi parmi les plus anciens, devrait aussi être présent en qualité de médiateur. Un règlement est beaucoup moins rigide que le verdict officiel d'une commission d'audience. Celle-ci ne peut que décider si le congediement est motivé ou non. Un règlement ouvre la voi à d'autres possibilités. Lorsque ses erreurs sont portées directement à son attention, un professeur peut exprimer sa détermination de s'amender et, au besoin, de présenter des excuses, ou il peut accepter une sanction moins sévère que le renvoi, par exemple la perte de son ancienneté ou l'abandon de fonctions supplémentaires qui arrondissent son revenu. D'autre part, si l'administration est résolue à renvoyer le professeur, elle peut convenir de lui offrir une compensation appropriée et de le munir d'assez bonnes références s'il veut bien démissionner. Quoi qu'il en soit, cette réunion ne peut nuire à personne et elle peut dispenser de la nécessité d'une instruction en bonne et due forme.

Répercussions d'une audience officielle

Une dernière observation est de mise au sujet d'une audience officielle en bonne et due forme: une fois qu'elle a été mise en marche et qu'un professeur est jugé coupable de graves infractions, les conséquences pour lui sont beaucoup plus compromettantes que s'il était simplement renvoyé sans avoir pu se prévaloir de procédures établies pour la sauvegarde de ses droits. Si aucun fait n'a été officiellement prouvé, il peut se dire victime d'une machination "politique", soutenir qu'il a servi de bouc émissaire ou invoquer d'autres excuses. Ces sauvegardes, qui aident un professeur injustement accusé, facilitent la con-

damnation du coupable, qui, autrement, pourrait échapper à un verdict clair et net. Il s'ensuit qu'il sera préférable pour un professeur, coupable d'une grave inconduite et saisi des accusations portées contre lui, de s'en aller de lui-même discrètement plutôt que de mettre en branle les rouages d'une enquête. Les procédures officielles suppriment l'avantage douteux d'un congédiement qui ne s'accompagne que d'une vague atteinte à la réputation.

PARTIE V REVUE DE CERTAINS REGLEMENTS ACTUELS TOUCHANT LA TITULARISATION

Après avoir examiné l'ensemble des procédures, nous pouvons nous arrêter à un certain nombre des réglements actuels pour déterminer dans quelle mesure ils répondent aux normes souhaitables de protection en matière de stabilité d'emploi.

Institution "A"

Les règlements de cette institution sont précis. La nomination d'un professeur "pour une période indéfinie" crée "la stabilité d'emploi en ce sens que ses services ne prendront fin par la suite que pour un motif suffisant, sauf s'il est mis à la retraite pour raison d'âge ou d'invalidité totale ou à cause de circonstances extraordinaires découlant de la situation financière de l'institution". Si des procédures de congédiement sont instruites contre un professeur titularisé, "il en sera officiellement informé avant que les accusations portées contre lui soient entendues et on lui fournira l'occasion de se défendre en présence des intéressés. Il sera autorisé à se faire accompagner d'un conseiller de son choix, qui poura lui servir d'avocat. Un compte rendu sténographique complet de l'audience sera mis à la disposition des parties".

Cette déclaration, toute brève qu'elle est, renferme certains des éléments essentiels à une instruction équitable de la cause. Manifestement, toutefois, il y manque le droit de confrontation avec l'accusateur, le droit de contre-interrogatoire, le droit de faire entendre des témoins pour sa propre défense (bien que ce droit puisse être sous-entendu dans les mots "l'occasion de se défendre") et celui d'être informé des motifs de la décision. Fait très important, cependant, la cause est instruite devant le Bureau des gouvernuers et aucun appel n'est possible. Si c'est le Bureau qui est appelé à se prononcer sur des accusations portées par le président, la cause est en quelque sorte jugée d'avance.

Institution "B"

Le "Manuel des enseignants" publié par l'institution déclare: "Les nominations pour une période indéfinie sont présumées valides aussi longtemps que les fonctions continuent d'exister et que le titulaire donne satisfaction, jusqu'à l'âge normal de la retraite". A propos de congédiement, on y dit: "Bien que le président soit tenu d'écouter ce qu'on lui rapporte sur . . . le compte du personnel, quelle que soit la source de ces renseignements, ni lui ni aucun autre administrateur ne peut se fonder sur ces rapports pour instruire une cause contre un membre du personnel, sans exiger que le rapport soit mis par écrit et signé par son auteur. De plus, il y aurait lieu de fournir au professeur l'occasion de répondre et de comparaître devant une commission du Bureau s'il le désire." La nébulosité du texte, en particulier des mots "il y aurait lieu", laisse planer des doutes quant à savoir si la déclaration crée un droit contractuel ou propose simplement au président une méthode qu'il peut accepter si elle lui convient. Quoi qu'il en soit, les droits qui sont ici définis ne sont pas aussi clairs que dans le premier exemple.

Institution "C"

"Les Règlements et Usages administratifs" publiés par l'université stipulent que: "Les nominations aux grades de professeur associé, de professeur et de doyen ont une durée indéfinie. Elles valent pour aussi longtemps que les fonctions continuent d'exister et que le personne désignée s'en acquitte de façon satisfaisante, jusqu'à l'âge normal de la retraite." Sous la rubrique "Démissions", on trouve cette dernière déclaration: "Pour l'annulation de toute nomination, l'université s'engage à donner un avis d'au moins trois mois." S'il faut prendre cela à la lettre, l'université peut, sans motif, congédier n'importe quel professeur en lui donnant trois mois d'avis; ces règlements n'assurent aucune protection juridique du côté de la stabilité de l'emploi. D'autre part, ce texte s'applique peut-être uniquement aux nominations valables pour une période définie et qu'on n'entend pas renouveler (bien qu'il ne nous éclaire pas là-dessus); dans ce cas, aucune procédure de congédient n'est prévue pour les professeurs titularisés et l'on se trouve devant une situation à peu près analogue à celle qu'a révélée l'affaire *Wilson*. Si un professeur renvoyé à tort décide de revendiquer les droits qui lui sont juridiquement reconnus, il lui faudra convaincre le tribunal qu'il n'a pas eu l'occasion de se défendre ou qu'il a été renvoyé pour des motifs insuffisants.

Institution "D"

D'après un rapport préparé en 1958 pour la section locale de l'A.C.P.U., tous les employés de cette institution peuvent être congédiés par le Bureau des gouverneurs "pour motifs d'immoralité, d'incompétence, ou pour toute raison administrative qui, de l'avis du Bureau, nuit au bien-être général de l'université". En réalité, la stabilité de l'emploi est inexistante.

Institution "E"

Cette institution a tenté un réel effort pour consacrer la stabilité de l'emploi et pour la renforcer par des procédures de sauvegarde. Les règlements sont trop longs pour que nous les reproduisions dans leur totalité. En résumé, disons qu'on y énumère les causes les plus fréquentes de renvoi. La procédure suivante y est prévue en pareil cas: 1) Le principal convoque un Comité consultatif de la faculté, composé des doyens, du membre académique senior du sénat et du chef du département dont fait partie le professeur (sauf s'il s'agit d'une seule et même personne). 2) S'il est convaincu qu'il y a lieu de pousser les choses plus loin (la déclaration ne dit pas ce qu'il faut faire si le comité n'est pas de cet avis mais si le principal veut pousser les choses plus loin), le principal, *à titre de président,* doit en informer le professeur et le président de l'association des professeurs, et les inviter à comparaître devant le comité. 3) Si le comité est d'avis que cela ne suffit pas, il expose alors les accusations officielles, qu'il est loisible au professeur de contester devant un deuxième comité, celui de la titularisation, composé du principal, des doyens, de tous les chefs de département, du président de l'association des professeurs et de deux membres du personnel enseignant de la faculté conservée désignés par le professeur accusé. Ce comité choisit son propre président et établit sa propre procédure. 4) Le professeur a le droit "de soumettre les éléments de preuve pertinents, d'examiner des témoins et de plaider sa cause devant le comité après que tous les témoignages ont été recueillis". 5) Il doit y avoir un compte rendu des délibérations. 6) Le comité a sept jours pour présenter son rapport. 7) "Si le principal soumet la question au Bureau des régents, il doit lui fournir des exemplaires du compte rendu; en pareil cas, le membre de la faculté doit être invité à assister à la réunion afin de soumetre les observations qu'il jugera appropriées."

Ce document intéressant comporte plusieurs lacunes. Premièrement, il n'y est pas question du droit à un conseiller. Deuxièmement, le droit d'appel semble à sens unique. Bien que le principal puisse soumettre la

question au Bureau, rien n'indique que le professeur puisse en faire autant. On ne sait trop si une cause relative à un congédiement doit éventuellement être soumise ou non au Bureau. Troisièmement, le deuxième comité, celui de la titularisation, comprend à peu près tous les membres du premier comité (le comité consultatif), en particulier le principal et les doyens, qui en sont les personnalités dominantes. Si l'objectif visé était que le deuxième organisme recommence à neuf l'audition de la cause, sa composition même lui rend cette tâche impossible. Quatrièmement, la nomination, au sein du comité de titularisation, de deux membres choisis par le professeurs enlève à cet organisme son caractère judiciaire et le transforme en un conseil mixte d'arbitrage. L'arbitrage sous sa forme mixte, souvent utilisé pour régler les différends ouvriers (soit un "arbitre", qui est en réalité un défenseur, pour chacune des deux parties et un troisième membre impartial qui en réalité jouit d'une voix prépondérante) peut convenir aux compromis nécessaires dans ces circonstances mais n'a pas sa place dans une cause qui met en jeu la liberté universitaire. Même à titre de conseil mixte d'arbitrage, il ne convient pas; le professeur peut compter sur deux défenseurs qu'il a nommés, ou sur trois tout au plus si l'on compte le président de l'association des professeurs, tandis que l'administration a de nombreux représentants. Cinquièmement, si le comité, bien que non judiciaire dans sa composition, doit être considéré comme un organisme judiciaire, nous retombons dans une erreur fondamentale en ce sens que le principal et ses co-administrateurs sont juges dans leur propre cause.

Ces critiques mises à part, il faut louer cet effort qu'on a tenté pour assurer à l'accusé l'occasion de se défendre; on s'est donné beaucoup de peine, mais sans succès, pour mettre sur pied une procédure détaillée.

Institution "F"

L'Association des professeurs de cette université, négocie avec le Bureau des gouverneurs en vue de la préparation d'une série assez détaillée de règlements modelés de plus près sur ceux de l'*American Association of University Professors,* et comprenant également une procédure préliminaire de conciliation. Malheureusement, sur plusieurs points, les normes souhaitables ne sont pas atteintes.

Premièrement, c'est la commission d'audience qui décide si les parties peuvent se faire aider par des conseillers. La commission n'est pas l'organisme approprié pour se prononcer là-dessus; la décision

relève du professeur accusé et de lui seul. Autrement, la commission se prononcerait en quelque sorte d'avance sur un litige en décidant si oui ou non un avocat est nécessaire. Presque invariablement, un professeur accusé désire être accompagné d'un avocat. A mon avis, quand une commission d'audience refuse d'accéder à une demande en ce sens de la part du professeur, elle l'empêche de se défendre convenablement.

Deuxièmement, bien qu'une transcription complète de l'audience doive "être faite", on ne dit pas qu'elle sera accessible au professeur; le droit à un exemplaire n'est pas nécessairement sous-entendu. On pourra prétendre que l'université a besoin de cette transcription à ses propres fins pour qu'elle soit examinée par le Bureau des gouverneurs avant qu'il prenne une décision définitive. En ne reconnaissant pas au professeur congédié le droit au compte rendu des délibérations, il est clair qu'on compromet gravement son droit d'appel et il se peut qu'on l'empêche ainsi de trouver une nouvelle situation.

Troisièmement, le plan proposé prévoit que le président peut agir de son propre chef, quelle que soit décision de la commission d'audience. Le dernier article du règlement déclaire: "Si le président décide de présenter une recommendation au Bureau des gouverneurs à propos d'un congédiement, il transmettra au Bureau le compte rendu entier des déliberations de la commission d'audience. Si la recommandation définitive du président au Bureau des gouverneurs n'est pas conforme aux conclusions de la commission, le Bureau tiendra une réunion avec la commission avant d'en venir à une décision." A cause de cet article, la procédure entière et la décision de la commission ne sont plus qu'une simple recommandation au Bureau, recommandation qui se superpose à celle du président. C'est le Bureau qui rend la première et l'unique décision et cette décision est sans appel. Ainsi, la structure compliquée qu'on a mise sur pied pour permettre à l'accusé de se défendre est ébranlée. Il est certes étonnant de constater que cette méthode est recommandée par l'Association de professeurs.

Je propose les changements suivants: le président ne devrait pas être autroisé à présenter quelque recommandation que ce soit au Bureau avant que la cause du professeur ait été entendue. Si les conclusions de l'audience sont défavorables au professeur et s'il ne veut pas interjeter appel, le président transmet alors le décision au Bureau pour que le renvoi soit officiel. Si le professeur veut en appeler au Bureau, il devrait auparavant avoir droit à une nouvelle instruction, fondée uniquement sur le compte rendu et sur la décision de la commission. Le président ne devrait pas être autorisé à soumettre des observations

au Bureau, sauf au moment de l'appel qu'il aurait le droit de contester. Si la commission d'audience rend une décision favorable au professeur, le président ne devrait pas être autorisé à communiquer ses propres recommandations au Bureau. Tout au plus devrait-il lui être loisible d'en appeler au Bureau[23] de la décision de la commission; là encore, ses observations devraient se limiter à l'instruction elle-même et le professeur devrait être autorisè à défendre la décision de la commission. Il n'est pas nécessaire que la commission d'audience comparaisse devant le Bureau car elle n'est pas partie au différend. On estimerait tout à fait irrégulière toute tentative visant à la faire revenir sur sa décision.

Institutions "G" et "H"

Ces deux nouvelles séries de règlements semblent dénoter une absence de contact avec le monde extérieur. Elles ne tiennent même pas compte des efforts que d'autres universités canadiennes ont tentés sans trop de succès. L'université "G" déclare que "les membres du corps enseignent deviendront éligibles à des nominations "pour une période indéfinie" trois ans après leur accession au poste de professeur, quatre ans après leur accession au poste de professeur associé et sept ans après leur accession au poste de professeur adjoint. Les nominations "pour une période indéfinie" ne se feront pas automatiquement . . ."

Dans le cas de l'université "H", on a proposé ceci: "Une personne qui reste à la faculté de . . . après la période requise de postulat est censée jouir de la stabilité d'emploi. La commission de l'activité universitaire (qui se compose de membres choisis au sein de l'administration et du corps enseignant) fera enquête sur toute plainte portée à l'égard d'infractions relatives à la stabilité de l'emploi et soumettra des recommandations au président."

Ici encore, puisque la titularisation est expressément établie dans les deux universités et comme aucune définition n'est donnée des droits relatifs à l'instruction d'une cause, ce sont les tribunaux qui auraient à se prononcer sur la protection assurée à un professeur congédié.

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[23] Si le président possède un droit d'appel, ce droit devrait se limiter aux cas où le professeur a été trouvé coupable mais où la commission d'audience a statuté que sa conduite n'offre pas de motifs suffisants de renvoi. Le président peut alors en appeler de l'interprétation qu'a donnée la commission à l'expression "motifs suffisants". Si, de l'avis de la commission, le professeur n'a pas commis les actes dont on l'accuse, sa décision devrait être sans appel et devrait mettre fin à l'affaire, comme dans le cas de poursuites en cour criminelle.

Institution "I"

L'Association des professeurs à cette université est, autant que je sache, la seule au Canada qui ait recommandé au Bureau des gouverneurs l'adoption d'une procédure de congédiement qui réunit à peu près toutes les conditions d'une juste audition d'une cause. Le mémoire présenté en ce sens au Bureau des governeurs remote à 1959. Depuis ce temps, le statut de l'institution a changé et son organisation a été modifée; nous ne savons pas si la procédure recommandée a été acceptée.

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Les règlements que nous avons examinés, surtout ceux qui ont été rédigés par les associations de professeurs comme représentant l'objectif à atteindre, dénotent qu'on a confondu certaines notions et fonctions concernant les procédures de congédiement. En particulier, la confusion des rôles dévolus aux administrateurs et aux bureaux de gouverneurs des universités, qu'on fait agir à la fois comme juges et comme accusateurs, indique une certaine hésitation à faire face à un conflit déclaré entre le professeur et les autorités de l'université. Sous certains rapports, cette attitude est admirable car elle dénote une unité foncière de but et réflète la confiance. Mais elle est également illusoire. Une fois qu'un différend atteint le point où l'administration cherche à renvoyer un professeur titularisé, la bataille *est* engagée. Pour que la stabilité d'emploi du professeur soit dûment protégée, pour que la lutte soit égale, *tous* les éléments d'une juste confrontation doivent se trouver réunis. La lutte n'est jamais égale et jamais le professeur ne peut rivaliser en pouvoir, en argent et en acuité politique avec les ressources du Bureau, à moins qu'il n'ait recours à de basses tactiques, c'est-à-dire à la rumeur ou au jaunisme, ou à moins que l'occasion lui soit fournie de se défendre. Assurément, la deuxième solution est préférable.

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[24] L'A.C.P.U, en plusieurs occasions, a aidé des professeurs en difficulté; elle continuera sans doute de la faire.

NOTE ON A RECENT NON-CANADIAN CASE

by J. B. Milner*

The Canadian cases referred to by Professor Soberman are all described and commented on briefly by Professor Bora Laskin in in Appendix A to *A Place of Liberty* (George Whalley, ed. 1964).

Since these materials were assembled the report of the Privy Council decision in *Vidyodaya University of Ceylon and others* v. *Silva*[1] has reached Canada. It would appear to be the first pronouncement of English judges on the status of a university teacher and should be of interest. The following account is considerably abbreviated but it is hoped that the description of the facts is not misleading.

Professor Silva was appointed "lecturer grade I" in the department of economics on May 15, 1959. There was no term mentioned in the letter announcing the appointment. On September 1, 1960, Professor Silva was notified of his appointment as "professor and head of the depts. of economics and business administration with effect from October 1, 1960," subject to the passage of the 1960-61 university budget.

The University Act required the appointment by the council to be "upon an agreement in writing" but no agreement was in fact entered into. The standardized agreement in use, and said by the Vice Chancellor to have been sent to Professor Silva, who denied receiving it, continued an appointment until the professor reached his fifty-fifth year, but entitled the professor to terminate the agreement by giving written notice within three months of the end of a term. Professor Silva's position was, to say the least, quite ambiguous. Under the Act the council had power to "suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two thirds of the members of the council, renders him unfit to be an officer or teacher of the university".

On July 4, 1961, Professor Silva was notified that the university council had unanimously resolved to terminate his appointment from

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*University of Toronto.

[1] [1964] 3 All E. R. 865.

that day. No reasons and no notice or opportunity to be heard were given.

Professor Silva took the unusual course of asking the Supreme Court of Ceylon to quash the "order" of the council reported in their letter of July 4, on the ground that the council was under a duty to "act judicially" and should have given him a hearing. Such a course involved a special procedure of limited application and the only issue in this case was whether the circumstances were such that the procedure was applicable. This question in turn depended on whether the relationship of Vidyodaya University to Professor Silva was that of master and servant or of a different kind that would justify the procedure. The Ceylon Supreme Court quashed the "order". The University appealed and won. The Judicial Committee of the Privy Council agreed that the relationship was that of master and servant and no more. Bearing in mind the ambiguity of Professor Silva's position it is not clear just what relationship the Privy Council referred to.

Professor Silva's choice of procedure, which proved unfortunate, may have been made for various reasons, two of which are worth speculation here. First, he avoided any public hearing of the merits of the university council's case. It was hardly disputed that if the special procedure could have been used, the council's "order" would have been quashed for want of a hearing. But at no point could the court have been asked to review the merits of the council's decision. Thus Professor Silva would have got an order in effect restoring him to his position as professor and head of his department presumably with back pay—at least until the council, after giving him proper notice, could assemble to hear his side of the case. He was evidently content to abide by the council's ruling after a fair hearing. Had the University accepted the Supreme Court's decision, which was dated November 22, 1961, the council might have reconsidered the case and disposed of it within a few weeks. Instead, the University appealed and if the Privy Council had affirmed the supreme Court, its decision on November 5, 1964, would have restored to Professor Silva benefits extending back over a period of three years. The reason for the University's decision to appeal *may* have been simply it did not want to appear to concede that council deliberations were subject to the special procedure.

The second reason that may have prompted Professor Silva to try for the special procedure arises from the remedy he might expect in a contract action. Professor Soberman suggests the possibility of the

remedy of specific performance, or "reinstatement", where there is clearly tenure in a public university. Professor Silva's lawyer was perhaps not as sanguine as Professor Soberman, if in the ambiguous circumstances of Professor Silva's case he could be said to have "tenure", and subsequent events proved the lawyer to have been justified in his pessimism. Lord Morris of Borth-Y-Gest, who spoke for the Judicial Committee of the Privy Council, quoted the succinct remarks of Lord Reid in a House of Lords decision, *Ridge* v. *Baldwin*[2], who said, "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract . . . But this kind of case can resemble [without being the same as] dismissal from an *office* where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

A court holding such a view would be unlikely to equate, as Professor Soberman does, a public university teacher with tenure to a town clerk or other public official. In the *Wilson* case, the Nova Scotia statute spoke of the "offices" of the President and Professors. If the only remedy is contract damages, Professor Silva would have been expected to take reasonable steps to find suitable employment and his damages would have been modified by the amount he earned in that employment, or could have, had it likely been available, whether he accepted it or not. If the special procedure had applied, and Professor Silva had been reinstated, it is arguable that he would have had to mitigate his losses

It is unfortunate that the Privy Council, in Professor Silva's case, expressed so shortly its grounds for regarding an academic appointment as "the ordinary relationship of master and servant" without attempting to resolve the ambiguity of Professor Silva's position in the absence of a written agreement. Although the case is not binding on any Canadian court it might be looked at sympathetically by many Canadian judges. It offers little encouragement to the hope that the courts will imply "tenure".

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[2] [1963] All E.R. 66 at p. 71. Editor's italics.

COMMENTS ON "TENURE IN CANADIAN UNIVERSITIES"

A Report Prepared by Daniel G. Soberman, Faculty of Law, Queen's University.

I feel very much in Professor Soberman's debt for his penetrating appreciation of how matters stand respecting tenure, particularly the legal aspects of tenure, in Canadian Universities. The case for the establishment of dismissal procedures in every university has never been more compellingly put and, in addition, Professor Soberman has provided very specific guidance concerning the form such procedures must take if they are to fulfil their purpose adequately. Thus there is something immediate and concrete here that every faculty association and administration may profitably consider. He has also, however, drawn attention to a matter of more fundamental import, namely, that "in the long run security of tenure is not very meaningful without a voice in government." This is one, although only one, cogent reason for faculty associations to establish as a primary goal the effective participation of faculty members in the government of the university. Academics and administrators alike will be doing themselves and their society a disservice, however, if they view such a prospect in the context of a power struggle. It must surely be seen as a challenge to develop their collaborative skills to the fullest possible extent in the interests of the academic community of the wider community of which it forms a vital part. But no matter how we formulate our policies or plan to meet the challenges ahead, we will not be able to escape the issues Professor Soberman is concerned with, nor may we wisely ignore much of the good counsel he has given us.

G. H. Turner,
University of Western Ontario.

Professor Soberman's report on Tenure in Canadian Universities will do much to clarify a complex and cloudy problem. With his thesis that tenure might best be attained by each University passing regulations dealing with tenure problems and that these must include detailed specifications for any hearing which must precede dismissal, I would agree. I cannot but feel, however, that he has dismissed, too lightly,

the possibility of establishing legal tenure and that he has failed to point out that tenure can effectively be obtained without specific agreements. The Secondary School teachers of Ontario have, in effect, tenure and have a procedure for a hearing relative to dismissals without having entered into agreements or having regulations passed by any of the Boards of Education which hire, and may wish to fire, the teachers.

It is presumptuous of me to even discuss the legal aspects of tenure and I shall do so no more than to question whether Professor Soberman has not laid undue stress on the few relevant Canadian cases. These are not of recent date. I have always thought of the law as conservative, but not utterly static, and in employer-employee relations and related contracts we have come a long way since 1920, and a very long way since 1861. Moreover, the role of the Universities and their importance to national welfare have changed dramatically in the past two decades. It does not seem at all improbable that cases in the future will break with any precedents laid down in the ones cited by Professor Soberman. I raise these points not to suggest that fighting a series of legal cases is a good way to go about establishing tenure for Canadian University teachers. There could hardly be a worse way. It is, however, a possibility and selling that possibility short seems to me to give a slightly defeatist attitude to the discussion.

The effective tenure of high school teachers in Ontario is based on the solidarity of the membership of an effectively closed shop which no board dare antagonize. There is a formal procedure placing cases of dismissal before a Board of Reference but the existence of this and its power depends on the tightness of the teacher organization. The details of this scheme are available. Its effect is to put the O.S.S.T.F. in a position of great power, which exceeds by far anything even suggested for the C.A.U.T. We do not want, for example, to have to clear with the C.A.U.T. office before accepting an offer to move to another university. Nonetheless, the fact remains that a group such as C.A.U.T. can, if other procedures fail, do much more than it has done so far toward influencing terms of employment of its members. The O.S.S.T.F. is not a model for us to follow, but it is an organization worth some study when one is considering practical problems of tenure.

Harold M. Good,
Queen's University

Tenure was a hot issue when I arrived at the University of Alberta in the autumn of 1949. A few months earlier a senior Department Head had been dismissed by the Board of Governors. He had been notified of his dismissal by letter, and neither he nor his Dean had had any warning of this impending action.

An ad hoc committee of the Faculty Relations Committee (predecessor to our Association of the Teaching Staff) was permitted to examine the charges against the professor. They reported to a general meeting of the staff that, in their opinion, the dismissal was justified, although the details of the administration's complaints were never revealed. However, there was a very strong protest against the procedure adopted by the administration and the Board in this case. As a result of this the Board agreed that, in future, the executive of the Faculty Association should be notified of any impending disciplinary action against an appointee of more than five years' standing.

I understand that when a complaint is now made against a faculty member who has tenure, the Dean may appoint an advisory committee composed of faculty members and including a representative of the Faculty Association. The individual may submit to the judgment of his peers or may appeal to the Board of Governors.

Disciplinary action is, fortunately, a rare event. Our perennial problem is to adopt proper procedures for deciding on tenure (appointment without definite term) and for maintaining standards, once tenure has been granted. At this university the Dean appoints an ad hoc committee which advises the Dean and President whenever an individual is considered for tenure. As may be expected, the recommendation of the Head of the Department carries great weight. Some Heads feel that only the Head can and should make the appropriate recommendation. The appointment of a new Head to a department sometimes means that decisions on tenure are postponed until he has become better acquainted with his staff and their capabilities.

Faculty members who have achieved tenure, but whose performance has become inadequate, may be warned of a possible cessation of promotion or of salary increments. All such cases are considered in the individual Faculty Promotions Committees; and the individual has the right to appeal to the General Promotions Committee, which includes representatives of the Faculty Association and of the staff at large.

The above remarks illustrate some current procedures at the University of Alberta, as a preliminary to specific comments on Profes-

sor Soberman's report on "Tenure in Canadian Universities." In Part I of the report he asks, "Should tenure be legally protected?" and goes on to say that ". . . most teachers would prefer tenure recognized only as a moral obligation without legal sanction . . ."

The Association at this university has in the past resisted attempts to spell out our rights to academic freedom and tenure in legalistic terms and has preferred a very broad and general statement of principle, such as that of the C.A.U.T. Ad Hoc Committee on Academic Fredom and Tenure (C.A.U.T. *Bulletin,* 8, No. 3, p. 16, 1960). We have a strong Association and feel quite capable of fighting for the rights of our members when an injustice appears to have been done. This may be small comfort to the weaker Faculty Associations, which may quite understandably desire to have their rights spelled out in more definite terms, as a matter of contract at time of appointment. Fortunately the C.A.U.T. organization and resources are available to assist individuals and Associations that need such support.

In Part II, Professor Soberman refers to United States and English experience. Most of us think of Britain as a bastion of academic freedom based upon long tradition and unwritten agreements. While I was in London in 1960 I was invited to attend the December meeting of the Council of the A.U.T. I was startled to hear one speaker claim that, too frequently, the Professor will call in a junior lecturer and say, "Look here, old chap, you know, there is really no future for you in this Department." Such is the power and prestige of the Professor that the poor man usually resigns forthwith, without questioning the validity of any complaints. Delegates to the Council were urged to return to their institutions and inform their colleagues that they should never submit to such arbitrary procedures, but should demand a hearing and should call upon their local Associations for support.

I agree that tenure should not be legally protected; and so I can see very great value in the adoption of proper procedures to safeguard tenure, as outlined in Part IV of the report. It is difficult to see how fair treatment can be guaranteed to all parties in a dispute unless the procedures as described by Professor Soberman are adopted. I assume that Faculty and Board could adopt these measures by mutual agreement, and I would not suggest that they be incorporated into the legislation applying to the institution. In fact, the use of the word "should" in some current regulations (Part V) is because most provincial statutes give full final powers to the Boards of Governors, and these powers cannot be circumscribed by any such regulations.

To come back to Part I of the report, Professor Soberman discusses the relationship of tenure to university government. It is clear that, if the faculties had actual control of the running of their universities, many of these problems would not arise; or at least they would be settled democratically by the individual's colleagues. (In one of the sample draft Acts, submitted by us in our Report on University Government, 1963, we proposed that the Faculty have control of appointments, promotions, and dismissals.)

Since it seems highly unlikely that the Boards of Canadian universities will hasten to divest themselves of their statutory powers and privileges, Professor Soberman's Report can serve as a very valuable guide to Faculty Associations that are concerned about these problems. I would emphasize the following three approaches. (1) Assume that tenure is an inalienable right of professors (its advantages surely outweigh its drawbacks), and do not try to spell it out in legal terms. (2) Negotiate with administrations and Boards in drawing up regulations for proper procedures. Draft these regulations so that the decisions are in fact made by the individual's colleagues and peers—even if they have to be formally ratified by the President and Board. (3) Fight with all available resources if an injustice appears to have been done.

H. Bruce Collier,
University of Alberta.

TWO ASPECTS OF TENURE

The well-documented and reasonably complete Soberman Report on *Tenure in Canadian Universities* will assist considerably the effort of universities to formulate adequate principles and procedures relating to tenure. As a member of a joint faculty-administration committee established to draft a Professors' Handbook, I am making good use of the Report, and my work on the committee has helped be to formulate my ideas on tenure. Two aspects require consideration: (1) the relationship of tenure to academic freedom; and (2) the dismissal procedure for professors with tenure.

The tenure-academic freedom relationship is not unanimously accepted. The Soberman Report points this out and my personal observations confirm it. The reason is simple: academic freedom relates to the professor not to tenure. The mere exercise of one's academic

freedom should not be cause for dismissal whether or not one enjoys tenure. This is the theory. What of the practice?

In the absence of a contractual provision to the contrary, a professor without tenure may be dismissed without cause. Reasonable notice must of course be given, but cause need not be shown. The real cause for this dismissal may indeed be that he exercised his right to academic freedom. Hence the necessity of delimiting the scope of academic freedom. For the non-tenured professor should enjoy the same academic freedom as his tenured confrère who cannot be dismissed for exercising academic freedom because in the case of the latter the university must show cause. Here, it seems to me, rests primarily the relationship of tenure to academic freedom. To be complete, one must go on to define academic freedom. Although space does not permit such a definition, I might simply touch upon what one might call the threefold nature of academic freedom.

First, the university professor as a professional or expert in this field should be free in his pursuit of truth and in the transmission, oral and written, of his findings. Second, as a member of the university community, he should be free to express his views on university government for its improvement and to permit him better to perform his duties as professor. Third, as a member of the community at large, he should be free to express his views on matters of public concern and to participate in community affairs, in the interests of the common good and of his students who will thus be spurred on by living example to become leading citizens.

A professor should not be dismissed for honest and responsible exercise of this right to academic freedom. Accordingly, certain procedural safeguards must be formulated.

Since one must presume that a professor with tenure is fulfilling the responsibilities of his position, he should not be dismissed without proof of adequate cause. Although the definition of adequate cause is important, the adoption of a proper institutional procedure is of greater importance. The dismissal procedure may vary with the individual nature of each institution, but certain basic safeguards must be common to all. To my mind, the institutional procedure of any institution must include the following: (1) an Investigating Committee; (2) a Hearing Committee; and (3) the Board of Administration. The dismissal of a professor with tenure should be made only after proceeding through the institutional machinery which should include these three essential components.

The Investigating Committee would have as its function to investigate the charge against an accused professor in order to determine whether a *prima facie* case for dismissal exists, i.e., whether sufficient evidence exists to warrant a full hearing of the charge by the Hearing Committee. Primarily a fact-finding body, the Investigating Committee might be composed of three members appointed respectively by the Administration, the Professors' Association, and the accused professor.

The Hearing Committee would be the quasi-judicial body whose function would be to hear fully all the evidence relating to the charge and to decide on the sufficiency of the evidence to warrant dismissal. Should the Committee decide that the evidence is not sufficient to warrant dismissal, the Board of Administration would be bound to retain the professor. Should the Committee decide, however, that there is sufficient evidence for dismissal, the Board would have the option either to dismiss the professor or to exercise its prerogative of clemency to impose a lesser punishment. The formal decision to dismiss or retain the professor would always rest with the Board of Administration.

The Hearing Committee might be composed of three appointed members different from those on the Investigating Committee. An equitable composition of the Hearing Committee might be as follows: an appointee of each of the Administration and the Professors' Association, and a joint appointee of the Administration and the Professors' Association, who would be chairman. The appointment of the chairman, someone from outside the institution and preferably a member of the legal profession, would be made only after consultation with the C.A.U.T. Because the Hearing Committee is a quasi-judicial body, the accused professor should not have the right to appoint a member. To prevent the Administration from having an equal voice in the appointment of the Hearing Committee members would, in my opinion, be unrealistic and perhaps even unfair.

Thes comments are intended simply to provoke thought leading to action on the matter. It is my earnest hope that they might assist in some small measure in the formulation of principles and procedures acceptable both to administrations and professors to the end that the common individual interests of both groups will be protected according to norms of justice and equity. These have been well developed in the Soberman Report. A court of law would be loath to disturb the results reached in such manner.

Donat Pharand,
University of Ottawa.

I must be recognized that the principle of tenure does not rest merely on the self-interest of university teachers or on a pitying attitude taken towards them by a judge. The only serious reason for tenure in academic work is the public interest in the exercise of critical thought by trained and responsible people. A professional private right can only be defended on the ground that it is a matter of public policy.

My only complaint about Professor Soberman's report—which seems to me admirable in both temper and proposals—is that in some ways it does not go far enough. It seems to me that the author has fallen into the way, natural to the legal mind, of treating tenure as being primarily of legal importance. The greatest dangers of the present position, however, arise from the wide public importance of tenure. If it is a matter of public policy, rather than merely a matter of private right, then it must be granted only by formal process, and should be ended by process even more formal—i.e., a court-like procedure in which accused and accuser are brought face to face as equals before an impartial body mutually accepted beforehand. Moreover, not only the teacher accused should have the right to the best counsel available, but the board also, as accuser, on the principle that the public interest is involved.

The public interest, however, requires much more than the observance of the principle of tenure. A system of tenure can operate with full effectiveness—both protecting those who possess it and at the same time exacting from them the highest degree of responsibility—only in a university in which academics participate in all aspects of the government of the institution, financial as well as academic. For example, only a president in whose appointment the professoriate has had a voice can be accepted by the general academic body as a professional equal, rather than merely an administrative employee of a board.

W. L. Morton, Provost,
University College,
University of Manitoba.

STANDARDS, SIZE AND SECURITY OF TENURE

Prof. Soberman begins his fine study by stating that the rationale of tenure is that it protects free inquiry and discussion. Yet much of what he prescribes to protect tenure is better suited to protection of non-academic values.

Notice, confrontation, counsel, cross-examination, are all designed to ensure the full disclosure of controverted facts: who did what to whom and when? However, the trial-type hearing produces no answer to the difficult problems of policy-making: what is the proper standard of conduct to impose on a faculty member? For example, a trial-type hearing may produce an answer to the question "Did Prof. A., a member of the Communist Party, advocate Marxism in Poli. Sci. 103?" but not to the question "Should members of the Communist Party be permitted to teach political theory?" By its very nature, free inquiry and discussion is public, and those who claim the right to question or preach will seldom deny that they have done so. The situations which will raise issues of a controverted fact are much more likely to centre on personal conduct which bears no relation to the rationale of tenure: "Was Prof. B. seen in compromising circumstances with student C?", although even here an affirmative answer leaves open the question of whether he is to be censured or congratulated.

My point is that while procedural safeguards are desirable, even essential, they are meaningless without firmly established standards against which to measure the facts found.

These standards embrace four kinds of conduct which have traditionally been grounds for dismissal: political or philosophical positions (in public and in class); criticism of the administration; professional incompetence; and personal misconduct. Only the first, and likely the second, of these pose problems related to "free inquiry and discussion." Dismissal on either of the latter two grounds would not appear to jeopardize intellectual freedom, although there remains the possibility of a trumped-up charge to camouflage sinister motives. Thus standards must affirmatively announce two distinct principles: (a) the right to freedom of opinion and expression in matters academic, administrative, and political, and (b) immunity from dismissal for any reason save proven personal or professional misconduct.

Moreover, to formulate these standards in the context of a particular controversy, by *ad hoc* disposition of a given case, is to invite injustice. At the very time when a fair rule is most needed, there is the least chance of articulating it. Thus, Professor Soberman's acknowledgment of the right of the Board of Governors, on appeal, to overrule the decision of a faculty hearing committee if it "did not understand the grounds for dismissal", ignores the fact that the real issue is likely to be whether certain conduct actually ought to be grounds for dis-

missal. Only the most carefully forged, pre-tempered standards will withstand the emotional heat of academic crisis.

Prof. Soberman very rightly emphasizes that legal sanctions are only useful as "a last resort", that a "long and honourable history" of academic freedom is the happiest, thaugh not the surest, guarantee for faculty members. Yet, paradoxically, the legal procedures he recommends as ultimately necessary are least likely to be workable in the very institutions which require them most, and most likely to be secured in institutions which will use them least. Size, it seems to me, creates this paradox.

Apart from an all-out state-sponsored attack, the greatest dangers to academic freedom are likely to arise in small, sectarian and local colleges, rather than in great federated metropolitan universities. Homogeneity of belief and of background seem more likely to produce pressures for conformity than diversity of origin and multiplicity of purpose. The "competitive market", whose beneficient influence Professor Soberman mentions, may be more likely to deter administrations with long shopping lists than those with four or five annual vacancies, from presenting an unfavourable image. The more intimate relationships between students, faculty and administration at a small school may make for closer scrutiny of the personal behaviour, of the philosophical and political views of individual faculty members; the shield of anonymity is gone. Finally, as C. P. Snow's *Masters* and Mary McCarthy's *Groves of Academe* so vividly demonstrate, personal loyalties and antagonisms—more intense at small institutions—may place great strains on even firmly established traditions of academic freedom. For all of these reasons, the defence of tenure at small institutions may require particular safeguards.

Yet the small institution presents real problems in the adoption of Professor Soberman's recommendations for procedural due process, particularly in the constitution of the hearing tribunal and the appellate body. Where the number of faculty members is small, there may be real difficulty in constituting a tribunal of "peers" who are not identified with the controversy. Particularly where the institution is a young one, with a preponderance of junior faculty, is the likelihood of such a committee's formation slight. (This problem will also exist in constituting a committee to pass on the initial granting of tenure.) Review by an appellate tribunal of Board of Governors' members—Professor Soberman characterizes suggestions of an independent reviewing body as "unrealistic"—is likewise more dangerous at a small institution.

Whether the small institution is supported by a sect, a community, or a private benefactor, Board members will probably be both paternalistic and like-minded. Are they then to be expected to conform to the restricted reviewing role which Professor Soberman envisages? Finally, adoption of Professor Soberman's procedual code may depend largely on the willingness of the administration to avoid confrontation with a powerful and vociferous faculty association, and to remain in the mainstream of Canadian university practices. Neither of these motivations is likely to be as important in a small, sectarian institution.

None of this means that small institutions as a group, or any small institution in particular, cannot meet the highest standards of procedural due process and substantive protection of academic freedom. Rather, these observations are intended to focus on the need to create uniformly high standards throughout the whole Canadian academic community.

Perhaps a useful device would be a joint C.A.U.T.-N.C.C.U.C declaration on the protection of academic freedom, and establishment of a permanent joint commission to give effect to such declaration through adjudication, as well as investigation and mediation.

H. W. Arthurs,
Osgoode Hall Law School,
Toronto.

Professor Smith has quite rightly emphasized the great importance of both academic freedom and tenure to the welfare of the university community. It hardly need be said that the welfare of the university community will bear directly on the general welfare of the community at large. It is not therefore desirable to take a limited view of tenure and while Professor Soberman may be thought to have limited the concept to procedural devices intended to prevent arbitrary dismissal, he links tenure very closely with what he calls university government. If the two distinct labels imply a restrictive view of tenure then I would prefer to make it clear that the tenure sought by a university teacher is more than "procedural due process" as the Americans might call it. I would define tenure to include the legal relationship between the university and the teacher, not merely in respect of his dismissal, or the termination of the relationship, but in respect of all his privileges and responsibilities as well as his rights. His responsibilities must include competency and reasonable effort and enthusiasm in scholarly teaching and research. His rights must include a fair opportunity for

promotion in rank and increase in salary. In my view, for example, tenure is not being respected when a teacher is denied promotion or a salary increase because of his political views.

Professor Arthurs quite rightly emphasizes the need for setting standards by which the facts determined at a hearing are to be measured. The determination of these standards is, I think, a major concern of the Committee on Academic Freedom and Tenure, or any special committee to which the Association may see fit to entrust such a responsibility. But I would not agree entirely with Professor Arthurs that the occasion of a hearing is not quite a suitable one for such a determination. In the context of particular facts general policies gain clearer meaning, and when hearings become necessary I hope full advantage may be taken of the opportunity to advance our thinking about standards. Professor Arthurs' view would be more consistent with acceptance of Professor Soberman's proposition on page 29 that it is "probably unrealistic to expect any of our institutions to give up the ultimate power of decision of the board". In fact, Professor Arthurs does not accept that proposition and, in my own view, it is not unrealistic. At those institutions where there is no accepted hearing procedure the governing board is subject to the control of the judiciary, including, quite possibly, the remedy of specific performance, with all the attendant publicity. What is being offered by Professor Soberman is, essentially, a private substitute for a public trial. No less could be proposed for a man whose livelihood is at stake. It is quite reasonable to expect boards of governors to be grateful for the opportunity to settle difficult disputes by a morally acceptable procedure that could protect both parties from undue publicity.

It follows, I think, that the hearing committee and any review or appeal body other than a court, should be composed of a single arbitrator or a committee of arbitrators whose impartiality is beyond question and who are acceptable to both the governing board and the aggrieved teacher. If they cannot agree on the identity of the arbitrators then the procedure should authorize some suitable person, certainly not anyone connected with the university administration or the teaching staff, to appoint the arbitrators. If Professor Soberman is right in thinking that a teacher should be tried by his peers then perhaps the arbitrator should be selected from some nearby faculty. In any case it would seem quite possible for the governing body to agree on this matter in advance and set out the formula for appointment in the collective agreement or regulations.

The reflection on standards at the time of a hearing should not, of course, be the only occasion for such activity. Professor Arthurs' suggestion for a joint C.A.U.T.-N.C.C.U.C. declaration is worth serious consideration by the Association. But there will be many other occasions when thinking on this difficult question may be advanced and published. Professor Collier shows an understandable reluctance to spell out rights of this sort, and lawyers are only too familiar with the ease with which one of their kind can find his way around the drafting of another. It does not surprise me to find university presidents asking when the Association is going to publish its rules. I am afraid some of them would like nothing better than a phrase or clause to quibble over. Our only hope is to develop a common understanding and acceptance of academic freedom and tenure in its support. I believe this can best come about by frank and free discussion over a period of pears. In short it is an educational process that may some day soon lead even our newest universities to speak of the "academic tradition".

Professor Good quite rightly emphasizes the need for a "legal" basis for tenure at the common law. He shows a healthy doubt, appropriate for any reasonable layman, about law based on century old precedent. While I cannot fully share Professor Good's optimisim, I think Professor Soberman puts the case for (or against) implied tenure rather more pessimistically than I would. There are two striking characteristics of the cases so far reported in Canada. They have been mostly decided by trial judges, only one having reached a court of appeal, and they are old enough cases that one may fairly suppose that the bench was less familiar with the university community and its traditions. One is entitled to ask, today, what the Supreme Court of Canada would decide. It is not remarkable that there have been only six cases in Canada, and only one has been appealed. Once you recognize the economic plight of university teachers over half a century ago it is remarkable that any could afford to litigate. But today it is not unreasonable that the Association might assist a teacher with a deserving case in an appeal all the way to the Supreme Court of Canada. It is, I think, possible but not probable that that Court might "imply" tenure of some sort in the engagement of a university teacher. As Professor Soberman himself points out, on page 22, "in most universities, a permanent appointment is considered by both staff and administration to give a security in practice that is absent in law". If this is true, as I think it is, then it seems to me to be quite reasonable to argue that what the parties intended to be their relationship in fact should be "implied" in their relationship at law. Perhaps one can

suppose that both parties were sophisticated enough to intend that the legal relationship should not be implied. I would *guess* that in most cases neither party gave much thought to the legal relationship. When appointments are made there is generally present a feeling of mutual trust. Each supposes the other to be a man of good will and he is not likely to be much concerned about legal relationships. In those circumstances an enlightened court might well think it appropriate to work out an "implied" legal relationship that more closely coincided with both parties' expectations than a crude "general hiring". A general hiring would entitle all but the most senior professors to a year's notice at best and probably not more than two year's notice to the most senior. And no reasons for dismissal would be necessary provided that notice was given. The termination of a contract by notice can be completely arbitrary.

I like to think the Supreme Court of Canada could rise to meet the occasion but I sincerely hope we never have to ask it to. If men of good will are not to be found in the university community they are not likely to be found anywhere. If we take every opportunity to spread enlightenment, we may hope that some day the disputes will be settled by a spontaneous recognition of our common interest.

J. B. Milner,
University of Toronto.

SUMMARY OF TERMS OF APPOINTMENT FOR ACADEMIC STAFF AT SIMON FRASER UNIVERSITY

1. **Academic Freedom:** Simon Fraser University subscribes to the following doctrine of academic freedom:

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his outer academic duties; but research for pecuniary return should be undertaken with the approval of the President.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not a spokesman for the University.

2. **Ranks:**

Dean—(There will be no permanent Deans of Arts or Science initially. There will ,however, be a permanent Dean for the Faculty of Education.)

Head of a Department (Appointments at the pleasure of the Board)
(Full) Professor
Associate Professor
Assistant Professor
Instructor Lecturer
Demonstrator
Teaching Assistant

(Demonstrators and Teaching Assistants will be appointed by the President—all other ranks by the Board.)

The term *Lecturer* will be kept for such special cases as visitors, etc. It could be used for a senior appointment of certain kinds and might command a substantial salary.

3. **Salaries:** The salaries for the various ranks will be comparable with those at other Canadian universities. A typical scale of floors in 1963-64 was:

Professor	$12,000
Associate Professor	9,000
Assistant Professor	7,000

4. **Date of Appointment:** As recommended by the President.

5. **Duration of Contracts:** Subject to initial negotiations and the previous rank and appointment, the maximum initial contracts will be:

Professor	Three years
Associate Professor	Three years
Assistant Professor	Two years
Instructor	One year
Demonstrator	One year
Teaching Assistant	One year

6. **Tenure:** Members of faculty will become eligible for appointment "without term" three years after the initial appointment as Professor, four years after the initial appointment as Associate Professor and seven years after the initial appointment as Assistant Professor. Appointments "without term" will not be given automatically, and they will not be given to administrative or non-academic staff. Before a member of faculty is given an appointment "without term" his record as a lecturer and scholar will be carefully reviewed by the President and Board of Governors.

7. **Duties:** Members of faculty are appointed on a twelve month basis. A faculty member of professional rank will normally lecture two semesters in a twelve month period, spending the third in research and the preparation of lectures. If he lectures in three semesters consecutively, he will not be paid extra for the third semester, but will be entitled to equivalent time free from lectures for research.

8. **Holidays:** Apart from statutory holidays, full time members of faculty are entitled to one month's holiday a year to be taken in the term in which they are not lecturing.

9. **Fringe Benefits:** Comparable to those at other Canadian universities. They include supperannuation, medical insurance, disability insurance, and group life insurance. The Province of British Columbia operates a hospital insurance scheme.

AUTUMN MEETINGS 1964

by J. Percy Smith*

The Executive and Finance Committee met in Ottawa in October, and in Montreal in November, at which time the Council also met. At these various meetings a great deal of business was dealt with, and a number of important decisions were taken. While the representatives of local associations will undoubtedly be reporting to their constituents, it may be useful to summarize some of the items here. Others are dealt with elsewhere in this issue, and still others will be dealt with at a later date.

1. **Security Investigations and Clearances, and Review Procedures.**

Members who read Hansard will already know that the assurances given by the Prime Minister in October 1963 concerning security matters have been thrown into a very doubtful light by statements made in the House since that time. The Council and Executive agreed therefore that the President should reopen discussion with the Prime Minister about this crucial matter, reiterating the stand taken by the Association.

2. **Academic Freedom and Tenure.**

It was decided that in the light of the Soberman report on tenure (published in this issue of the *Bulletin*), the Association must seek to draw up and adopt a stronger statement on the subject than that which was adopted in 1960. The Committee on Academic Freedom and Tenure was given the duty of preparing such a statement.

It was agreed also that some reorganization of the Committee on Academic Freedom and Tenure and the two Committees on Faculty-Administration Relations is necessary. The chairmen of the three committees are to make specific recommendations for such reorganization.

3. **Professional Ethics.**

It was decided to establish a committee which should seek to formulate a code of professional ethics for university teachers in Canada.

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*Executive Secretary, C.A.U.T.

4. **Unemployment Insurance.**

In the light of discussion and examination of the proposals made by the Committee of Enquiry into the Unemployment Insurance Act (the "Gill Committee"), Council passed the following resolution:

> "Resolved that the Canadian Association of University Teachers, while recognizing the obligation of university professors no less than of other sections of the community to participate in any scheme of comprehensive social insurance, records its opposition to the recommendations of the Gill Committee that might be interpreted as proposing to extend the coverage of the Unemployment Insurance Act to include university teaching staffs, since the legislation as presently framed and as envisaged by the Gill report does not proceed on the principle of comprehensive social insurance, but is rather a scheme for coverage of selected groups only, who, unlike university professors, may expect benefits from the scheme of the Act, and the proposal to exact contributions from university professors is therefore a proposal for discriminatory taxation; and resolved that a copy of this resolution be forwarded to the appropriate governmental authorities."

5. **Study of University Pensions.**

It was agreed that the Association should join with the Canadian Universities Foundation and the Canadian Association of University Business Officers in sponsoring a comprehensive study of university pensions in Canada, with a view to seeking some satisfactory nation-wide scheme. It is intended that the study should be made by a Commission of one or more investigators under the guidance of a steering Committee representing the three sponsoring bodies. The C.A.U.T. representatives are Professors Laurie Gauvin, of Laval University, and D. C. Baillie, of the University of Toronto.

6. **Associate Secretary.**

In view of the very rapid growth that is occurring in the extent and complexity of the Association an din the demands made on the national office, and in view also of the intention of the Research Assistant to leave the service of th C.A.U.T. in order to proceed with further graduate work, it was decided that an Associate Secretary should be appointed.

ANNOUNCEMENTS

Honorary Life Memberships

At the November Council Meetings, Professor F. R. Scott of McGill University and Professor F. A. Knox of Queen's University were given honorary life memberships in the C.A.U.T. The Association is pleased to be able to recognize in this way the interest in and services to the C.A.U.T. of Professors Knox and Scott.

Executive Committee Notice

Associate Executive Secretary

Because of the growth of the Association and the increasing work of the national office, the Executive & Finance Committee has decided, with the approval of Council, to appoint an Associate Executive Secretary. Applications are invited for this post.

In general, the Associate Executive Secretary will be expected to assist the Executive Secretary in conducting the business of the Association. His duties will include many that have been performed by the Research Assistant, who is resigning to pursue further academic work. Among such duties will be: gathering and analysing information about such matters as university government, non-salary benefits, university financing, etc.; serving on committees that deal with such matters; representing the Association in its relations with various other organizations or their committees (e.g., C.U.F., C.U.S., C.U.S.O., C.T.F.). He will be expected to deal with a considerable amount of Association correspondence. He may also be expected to visit local Faculty Associations from time to time, to act as a consultant on Association matters of all kinds, and to take charge of the operation of the national office when the Executive Secretary is absent. Facility in both French and English is highly desirable in the post.

Applications looking to a term of service of at least three years will be considered. It is the hope of the Committee that the Associate Executive Secretary will be able to assume his duties on or about September 1. The salary will be not less than the floor for Associate Professors at leading Canadian universities, and appropriate arrangement will be made in connection with pension, insurance, removal expenses, and other non-salary benefits. Applications, which must contain a curriculum vitae, should be sent in triplicate to the Executive

Secretary, Canadian Association of University Teachers, 77 Metcalfe Street, Ottawa 4.

Circulaire du Comité Directeur

Secrétaire Général Adjoint

Vu la croissance de l'Association et le travail accrû du Bureau National, le Comité Directeur et des Finances a décidé, avec l'approbation du Conseil, de nommer un Secrétaire Général Adjoint. Les candidatures à ce poste seront les bienvenues.

En général, le Secrétaire Général Adjoint aura à assister le Secrétaire Général dans l'exécution des affaires de l'Association. Ses responsabilités comprendront beaucoup d'entre celles qui ont été assumées par l'Adjoint à la Recherche qui se retire de poursuivre d'autres activités académiques. Parmi ces responsabilités figureront: la centralisation et l'analyse de renseignements concernant des sujets tels que l'administration universitaire, les avantages annexes, le financement des universités, etc. . . .; il aura également à siéger aux comités qui s'occupent de ces affaires; à représenter l'Association dans ses relations avec diverses autres organisations ou leur comité (par exemple: la F.U.C., l'U.C.E., le S.U.S.O., la C.T.F.). Il devra expédier une grande partie de la correspondance de l'Association. Il se peut qu'il ait à rendre visite de temps en temps à d'autres Associations locales, à agir comme conseiller dans des affaires de tous genres concernant l'Association, et de s'occuper du fonctionnement du Bureau National en l'absence du Secrétaire Général. Des connaissances à la fois en anglais et en français sont hautement souhaitables pour ce poste.

Des candidatures pour une durée de trois années de service seront prises en considération. Le Comité espère que le Secrétaire Général Adjoint pourra prendre ses fonctions le ler septembre ou aux alentours de cette date. Le traitement ne sera pas inférieur à celui du traitement de base des Professeurs Associés des universités canadiennes les plus cotées, et des mesures appropriées seront prises concernant la pension, l'assurance, les frais de déménagement et autres avantages annexes. Les demandes, accompagnées d'un curriculum vitae, devront être adressées en triple exemplaire au Secrétaire Général, Association Cannadienne des Professeurs d'Unifersité, 77 Metcalfe Street, Ottawa 4, Ontario.

Canadian German Academic Exchange Association Established

Under the aegis of the Embassy of the Federal Republic of Germany and through the efforts of Countess Eva Finckenstein, the Canadian German Academic Exchange Association was legally constituted and a charter granted at a February meeting of directors in Ottawa.

Officers of the new association elected by the directorate are Prof. Herman Boeschenstein (Toronto), President; Prof. I. Schmidt-Mackey (Laval), Vice-Pres., Eastern Canada; Prof. A. Anstensen (Sask.), Vice-Pres., Central Canada; Prof. J. B. MacLean (Victoria), Vice-Pres., Western Canada; Prof. Graf Robert Keyserlingk (Ottawa), Executive Secretary-Treasurer; Mr. Robert Greif (Ottawa Embassy), Deputy Treasurer.

The directors discussed ways and means of promoting interest in, and knowledge of German culture, and considered especially promotion of exchanges between Canadian and German universities for both instructors and students. Arrangements were made also to send approximately 270 Canadian students to Germany this coming summer on a Work-Scholarship plan.

Under the plan, students selected from universities across Canada from Victoria to St. John's will work for two months, June and July, in Germany, earning enough to enable them to enjoy a month's travel in August. The students will work in hotels, homes, hospitals, agriculture and industry.

June Council Meetings, 1965

The June Council Meetings will be held in Vancouver, British Columbia, on June 15 and 16. At the meeting the Nominating Committee will propose the following slate of C.A.U.T. officers for 1965-66:

President: Jacques St-Pierre (Montréal)
Past President: Bora Laskin (Toronto)
Vice-Presidents: Roy George (Dalhousie), Gideon Rosenbuth (British Columbia), Donald Rowat (Carleton)
Secretary: Paul Crépau (McGill)
Treasurer: Arthur Wood (Manitoba)

Canadian Service for Overseas Students and Trainees

The Canadian Service for Overseas Students and Trainees (C.S.O.S.T.) was inaugurated early in 1964. It assumed responsibility for

providing the national services for these people previously furnished by the National Committee of FROS, WUSC and their joint Overseas Student Reception Service.

C.S.O.S.T.'s immediate functions will be to maintain liaison with, coordinate the efforts of and provide information to governmental, university, business, industrial and voluntary agencies associated with the welfare of overseas students and trainees. It does not usually deal directly with these students except for the information service that is available to overseas enquirers. In Canada its services are channelled through the local bodies interested in these students, one example being the reception service made available at arrival points at the beginning of the present academic year.

Student advisors on the campus will already be aware of the services that C.S.O.S.T. provides. However, if C.A.U.T. members require more information than is available from local sources or wish to refer students to this organization then they should contact C.S.O.S.T. directly at 338 Somerset St. West, Ottawa 4.

The formation of this new body should not deter academics in their efforts to establish a better understanding with their overseas students, for the latter's academic performance depends to a considerable extent on their successful relationships with other members of the university community.

NOTICE OF POSITIONS VACANT*

University of Alberta, Edmonton, Alberta: Department of Slavonic Languages and Literatures. Position: Ukrainian or Polish, Lecturer or Assistant Professor. Duties to commence September 1, 1965. Apply: Dean of the Faculty of Arts, University of Alberta, Edmonton.

University of Alberta, Calgary, invites applications for the position of Head of the Department of Biology, effective 1 September 1965. Appointment will be at the rank of Associate or Full Professor with salary range to $14,000. Demonstrated ability in research and administration, and interest in the development of a rapidly expanding department are essential. The area of research interest it open. Currently there are eleven full-time academic staff members. A graduate program has been initiated and the department will acquire spacious new facilities during the coming summer. Applications and inquiries should be addressed to the Dean, Faculty of Arts and Science, University of Alberta, Calgary; Calgary, Alberta, Canada. Curriculum vitae should include names of three referees. Closing date, 31 March 1965.

Dalhousie University, Halifax, N.S.: expects to appoint four economists for the academic year 1965-6, to bring its establishment to eight economists. Some of the areas of particular need are theory, development, Canadian economic history, history of economic thought, comparative economic systems, transportation economics, and economics of natural resources, but the department is mainly concerned to attract good men who are strong in theory, and will try to accommodate their particular interests. Salary and rank will depend on qualifications. Apply to John F. Graham, Head, Department of Economics and Sociology, Dalhousie University, Halifax, Nova Scotia.

Lakehead College of Arts, Science and Technology, Port Arthur, Ontario: *Faculty of Arts.* Applications for an appointment to teach introductory undergraduate survey courses in any one of the following subjects should be sent to G. O. Rothney, Dean of Arts: (a) *Economics*, referably with special interest in either labour economics or in the economics of northern development (forestry, mining, transportation); (b) *Geography,*

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*Notices of positions vacant are carried free of charge.

preferably with special interest in human geography and in the geography of the north (Canada, Nordic Europe, the U.S.S.R.); (c) *Political Science,* with a special interest in Canada, Nordic Europe, the U.S.S.R., contemporary China, or the history of political theory; (d) *Psychology,* possibly including Educational Psychology; (e) *Russian,* with an emphasis on the contemporary spoken language, in combination with French, German, Latin, or Finnish; (f) *Sociology,* with an interest in applied fields, and in a community of mixed British Isles, European, and American Indian origins. *Faculty of Science.* (a) *Mathematics.* The Department is expanding and two appointments may be made—one at a senior and one at a junior level. State interests and experience. Apply to H. S. Braun, Principal and Acting Dean of Science.

Applications should be accompanied by a curriculum vitae, a recent photograph, and the addresses of at least three referees. Appointments will be effective September 1st, 1965, and are subject to confirmation after two years. Rank will depend upon training and experience. In all cases, a Master's degree or its equivalent is a minimum requirement. Research by Faculty members is encouraged. Minimum annual salaries are as follows: Lecturer $6,500; Assistant Professor $8,000; Associate Professor $9,750; Professor $13,000. Annual increments of $300 (Lecturers) and $400 (other ranks).

Lethbridge Junior College, Lethbridge, Alberta: In September of 1965, the College will begin the second year of a three-year undergraduate program in affiliation with the University of Alberta. Applications are invited for the following positions: (a) Biology—Second-year Zoology; (b) Chemistry—Quantitative and Inorganic; (c) Economics—Money and Banking, Micro-Economics; (b) English—Any field; (e) Geography—Any field; (f) History—European; (g) Mathematics—Statistics and Mechanics; (h) Modern Languages—French (second-year); (i) Philosophy—Western; (j) Physics—Any Experimental field; (k) Political Science—Any field; (l) Psychology—first-year Educational Psychology; (m) Psychology—General; (n) Sociology—Any two broad fields. Duties will begin September 1st, 1965, in most fields. Appointments in Biology, Chemistry and Physics will begin earlier than September 1st. Anyone who holds a Ph.D. degree or has completed approximately one year beyond the master's degree in a subject field is invited to apply. Associate Professor $11,000 to $13,600; Assistant Professor $8,200 to $10,600; Lecturers $6,000 to $7,800. Apply, giving names and addresses of three references together with curriculum vitae to Carl B. Johnson, Principal.

University of Manitoba, Winnipeg, Manitoba: Applications are invited for posts in the Department of Electrical Engineering, to commence September 1, 1965. Applicants should have the Ph.D. and have demonstrated capability for research. Duties will include Graduate and Undergraduate teaching. Apply to the Head, Department of Electrical Engineering, University of Manitoba.

University of Manitoba, Winnipeg, Manitoba: Department of English. There are vacancies for Assistant Professors and Lecturers in the Department of English. Lecturers should have M.A. or equivalent qualifications, and Assistant Professors a Ph.D. degree or its equivalent. The posts will involve the teaching of literature in the general B.A. curriculum, and, for suitably qualified Instructors, participation in the Honours program in their fields of specialization. The salaries will be approximately as follows: Lecturer: $7,500-$7,900; Assistant Professor: $8,000-$10,400. Appointments will be effective from September 1st, 1965. The closing date for applications is March 31st, 1965. Applicants are invited to send inquiries, *curricula vitae,* lists of publications and other relevant information to: G. H. Durrant, Chairman, Department of English, University of Manitoba, Winnipeg 19, Manitoba.

McMaster University, Hamilton, Ontario: Applications are invited for an appointment in the Department of Russian, with duties commencing July 1, 1965. The applicant should have a Ph.D. in Slavic studies with concentration in Russian language and literature. Experience in undergraduate and graduate work is essential. Rank and salary will depend on qualifications of successful candidate. Details of academic training and teaching experience and names of three references should accompany letters of applications sent to L. J. Shein, Chairman, Department of Russian, McMaster University.

Memorial University of Newfoundland, St. John's, Newfoundland: Director of Extension. To administer, broaden and strengthen a well-established programme mainly concerned with Adult Education and Community Development. Candidates should have a Master's degree or equivalent, relevant experience, and wide interests, including sympathy with the educational aspects of economic and social improvement in a developing Province. Rank and salary dependent upon qualifications and experience. Applications, naming three referees, not later than 6th March to the President, Memorial University of Newfoundland, St. John's Newfoundland, from whom further particulars may be obtained.

Mount Allison University, Sackville, N.B.: The Department of Economics and Political Science invites application for an appiontment in economics, salary and rank dependent upon qualifications. Preference will be given to applicants at the Ph.D. level or equivalent. Applications, which should include a detailed *curriculum vitae* and names of references, may be sent to the Department Head, W. B. Cunningham, P.O. Box 706, Sackville, N.B.

University of New Brunswick, Fredericton, N.B.: The Department of Classics and Ancient History will require an instructor to take charge of its curriculum (first two years) in Saint John or, alternatively, to join its main staff in Fredericton. For either post ability to handle Classics-in-translation is a recommendation. Salary will be from $6,000 upward depending on qualifications. Appointments will normally be for a 2-year probationary period. Applicants for either post are invited to send enquiries, *curricula vitae*, and other relevant information to: R. E. D. Cattley, Head, Department of Classics, University of New Brunswick, Fredericton, N.B.

University of Saskatchewan, Saskatoon, Saskatchewan: Applications invited for the following positions. Assistant or Associate Professorships, depending on qualifications, are available in the fields of Physiology, and Histology and Embryology. Teaching and research experience desirable. Applicants should have D.V.M. and/or Ph.D. degree. Salary $8,000 and up. Apply to Dean, College of Veterinary Medicine, University of Saskatchewan, Saskatoon, Saskatchewan, Canada.

Sir George Williams University, Montreal, Quebec: Department of Fne Arts. Lecturer or Assistant Professor required for 1965-1966. M.A. or Ph.D. in Art Education to teach undergraduate, and graduate courses at the M.A. level. Would be expected to teach Art Education courses to classroom teachers and art majors. Should be able to supervise students doing M.A. projects and research in art education. Starting salary between $6000 and $7000. Inquiries and personal data should be sent to: Assoc. Prof. A. Pinsky, Chairman, Department of Fine Arts, Sir George Williams University, 1435 Drummond Street, Montreal, Quebec.

Sir George Williams University, Montreal Quebec: Applications are invited for two appointments to be made in the Department of Political Science for the 1965-66 session. One of them will be at the level of

lecturer or assistant professor with emphasis on comparative government and Canadian government. Should have Ph.D. or be well advanced towards it. The other appointment will be a senior one, probably at the associate level, with specialization in Comparative Government (European) and American Government. Ph.D. and several years or full time teaching essential. Salary and rank in both cases will depend on qualifications and experience. Applications should be sent to the Chairman of the Department of Political Science, Sir George Williams University, 1435 Drummond St., Montreal.

University of Victoria, Victoria, B.C.: Applications are invited for the posts of: (1) Assistant Professor in Inorganic Chemistry, Salary $7,000-$9,000 according to qualifications. Minimum requirement Ph.D. with some teaching experience; (2) Laboratory Demonstrator in Physical Chemistry. Salary $4,000-$5,000 according to experience. Minimum requirement honours degree in Chemistry. Duties start September 1, 1965. Write Prof. L. J. Clark, Department of Chemistry. University of Victoria, Victoria, B.C.

University of Victoria, Victoria, B.C.: The Department of Biology intends to make appointments to the following posts for which applications are invited. **Ichthyologist** or other marine vertebrates specialist; **Biological Oceanographer; Comparative Physiologist; Mycologist** (preferably marine); **Biochemist.** Each successful applicant will be expected to teach a senior course in the field of his specialty, to assist with some junior classes, and to conduct research. Appointments will be at appropriate rank and salary according to qualifications and experience. Ph.D. required. Duties commence September 1, 1965. **Laboratory Instructors** in Botany and Zoology (preferably with Master's degree or course work for it completed) will also be appointed. Applications should include biographical information a *curriculum vitae,* the names of three referees (from whom letters should be sent direct), a recent photograph and statement of salary expected. Transcripts of academic records will be required. Applications should be sent to W. Gordon Fields, Department of Biology, University of Victoria, Victoria, British Columbia, Canada.

University of Guelph, Guelph, Ontario, Canada: Applications are invited from two Zoologists. Salary open and commensurate with experience. Proven research experience in modern biology prerequisite to appointment. Applications to be submitted by May 30th, 1965 to Professor K. Ronald, Chairman, Department of Zoology.

Université Laval, Faculté de Commerce: Deux ostes de professeur sont offerts pour l'enseignement de la Statistique appliquée aux Affaires, (l'enseignement se donne dans la langue française). Prière de solliciter l'emploi sous forme de lettre en indiquant les renseignements suivants: grades académiques: intérêts particuliers comme statisticien et expérience. Le traitement dépenda des années d'expérience et des grades académiques Veuillez adresser votre demande à: Gustave Tardif, é.c., Donyen, Faculté de Commerce, Cité Universitaire, Ste-Foy.

McGill University, Montreal, P.Q.: Applications are invited for (1) Full Professor in Communications preferably with some experience in the field of Statistical Communications Theory. Salary according to qualifications; minimum $13,000; and (2) Associate Professor in Control Engineering or Communications. Salary according to qualifications; minimum $10,000.

Mount Allison University, Sackville, N.B.: Commerce Department invites applications for a position, rank open. Salary depends on qualifications and experience. Master of Business Administration or better degree required. Appointment effective July 1, 1965. Closing date for applications, August 31, 1965. Reply to N. Vos, Head, Commerce Department.

University of Manitoba, Winnipeg, Manitoba: The Department of Mathematics has a number of openings at all ranks. Salary scale is as follows: Assistant Professor, $8,000-$10,400; Associate Professor, $10,500-$13,400; Professor, $13,500-open. Appointment is from September 1, 1965. Details on pension plan, conditions of employment etc. will be sent on request. Applicants should apply to Head, Department of Mathematics, University of Manitoba, Winnipeg, Canada. Please enclose a short curriculum vitae including a list of publications and two references.

NOTICE OF PERSONS AVAILABLE FOR APPOINTMENT*

Replies should be addressed to the relevent Box No., C.A.U.T. National Office, Room 603, 77 Rue Metcalfe St., Ottawa, Ontario.

Box 67. Political Science: Man: 28, married, Ph.D., 3 years' university teaching. Presently completing a manuscript for publication, and teaching (Assistant Professor) at a state university in Illinois. Promise of future scholarship and professional participation. Desires Politics with particular emphasis on the politics of the developing areas, American Government, International Relations, and Public Administration. Behavioral orientation. Related interest: Sociology. Available June, 1965.

Box 68. Political Science: Ph.D. (McGill) seeks full time position to teach Political Science subjects, including public international law, international politics, public administration.

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Box No. 74. Agronomy: Male, age 41, B.Sc. (Agri.), M.S. (Plant Breeding) Utah State, U.S.A. Ph.D. (Plant Breeding), Kansas State, U.S.A. Post Doctorate (Seed testing and seed certification) Ohio State, U.S.A. 10 years experience in Research, Teaching and extension on Vegetable Crops in responsible positions. Numerous publications.

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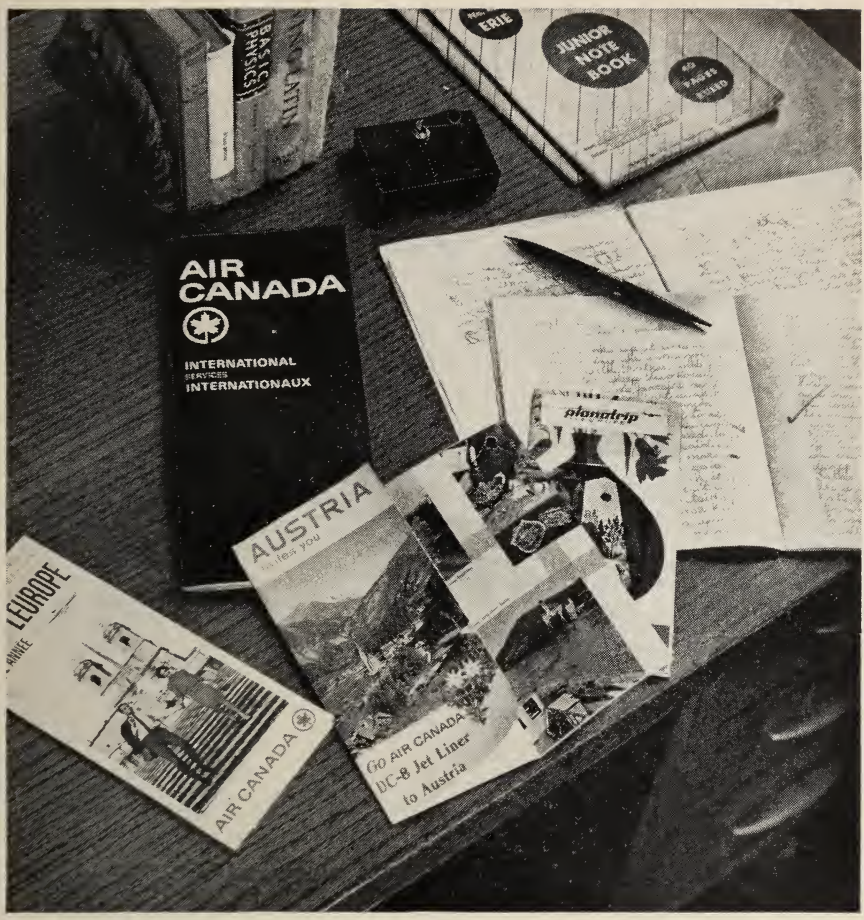

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